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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 237

WISCONSIN ELECTRIC POWER COMPANY,
PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 21, 1948

CERTIORARI GRANTED OCTOBER 18, 1948.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

[Placita omitted]

[fol. 2]

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WISCONSIN**

Civil Action No. 1680

WISCONSIN ELECTRIC POWER COMPANY, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

COMPLAINT—Filed November 1, 1944

To the Honorable Judge of the District Court for the
Eastern District of Wisconsin:

Plaintiff, Wisconsin Electric Power Company, for a complaint herein against the defendant, alleges and shows to the court:

1. Plaintiff, Wisconsin Electric Power Company, is a corporation duly organized and existing under the laws of the State of Wisconsin and at all times mentioned herein was engaged, pursuant to its articles of incorporation, in the conduct of an electric utility furnishing electrical service to the public in the Cities of Milwaukee and Racine and in territory adjacent thereto pursuant to due authority. Plaintiff is and was at all times mentioned herein a resident and citizen of the Eastern District of Wisconsin and at all times had and still maintains its principal office and place of business in the City of Milwaukee, Milwaukee County, Wisconsin.

2. This is a suit of a civil nature brought to recover internal revenue taxes known as Federal Electricity Taxes (Section 616 (a) of the Revenue Act of 1932, as amended, Section 3411 (a) of the Internal Revenue Code) unlawfully imposed upon the plaintiff and collected from it by the defendant and now held and retained by the defendant. Jurisdiction is conferred upon this court by paragraph 20 of Section 24 of the Judicial Code (U. S. C. A., Title 28, Section 41-(20). The amount in controversy exclusive of interest and costs in this suit is less than the sum of Ten thousand (\$10,000.00) dollars.

3. During the period from April 1, 1940, to July 31, 1943, inclusive, plaintiff furnished electrical energy to certain customers, to wit, various dairies in and about the City of Milwaukee and the City of Racine, Wisconsin, engaged in the pasteurization of milk and for the purpose of such pasteurization, in respect of which electrical energy the plaintiff paid Federal Electricity Tax at the rate of 3% of the amount billed in the period from April 1, 1940, to June 30, 1940, inclusive, and such tax at the rate of $3\frac{1}{3}\%$ thereafter. During such period all electrical energy so furnished was billed and collected at rates prescribed by the Public Service Commission of Wisconsin under Chapter 196 of the Wisconsin Statutes, and the plaintiff did not increase its rates for any class of service to include or reimburse the plaintiff for the tax imposed by said Section 616 (a). The tax so paid was not collected from consumers but was borne entirely by the plaintiff.

4. On May 25, 1944, the plaintiff seasonably filed its claim for refund of such tax in the principal amount of Six thousand eight hundred six and 84/100 (\$6,806.84) dollars on the ground that such sales of electrical energy had been erroneously treated in the plaintiff's returns as sales for domestic and commercial consumption, whereas, the principal use of such energy and the principal business conducted by such customers at the premises where such energy was consumed was the processing of dairy products by the pasteurization and bottling of milk, energy for which operations is exempt from tax under the Act and applicable Regulations as determined by the Circuit Court of Appeals for the Tenth Circuit in *United States v. Public Service Company of Colorado*, 143 Fed. (2d) 79. Such claim was filed with the Collector of Internal Revenue at Milwaukee, Wisconsin, and thereafter, on October 16, 1944, the Commissioner of Internal Revenue rejected and disallowed such claim for refund upon the sole ground that the Commissioner does not acquiesce in the determination of the Circuit Court of Appeals for the Tenth Circuit.

5. There is justly due and owing to the plaintiff by reason of such excess collection and the rejection of claim for refund therefor the sum of Six thousand eight hundred six and 84/100 (\$6,806.84) dollars, with interest from February 1, 1942 (the approximate average date of such payments).

[fol. 4] Wherefore, plaintiff demands judgment against the defendant pursuant to law in the sum of Six thousand eight hundred six and 84/100 (\$6,806.84) dollars with interest as aforesaid together with its costs herein.

James D. Shaw and Van B. Wake, Attorneys for Plaintiff. Address: 773 North Broadway, Milwaukee 2, Wisconsin.

Duly sworn to by L. F. Seybold. Jurat omitted in printing.

[fol. 5] IN DISTRICT COURT OF THE UNITED STATES
 • • (Caption—1680) • •

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon James D. Shaw and Van B. Wake, plaintiff's attorneys, whose address is 773 North Broadway, Milwaukee, Wis., an answer to the complaint which is herewith served upon you, within sixty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

B. H. Westfahl, Clerk of Court (Seal of Court).

Date: November 1, 1944.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil procedure.

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the First day of November, 1944. I received the within summons and complaint at Milwaukee, Wis., and served the same by delivering to and leaving with T. T. Cronin, U. S. District Attorney, a true copy thereof, and I further certify that I served the Attorney General of the United States by mailing to him at Washington, D. C., by registered mail, a true copy thereof; the First day of November, 1944, at Milwaukee, Wis.

Anton J. Lukaszewicz, United States Marshal, By
 James G. Carnahan, Deputy United States Marshal

Marshal's Fees
 Travel \$0.06
 Service 4.00

 4.06

Endorsed: District Court of the United States. • • (Caption—1680) • • Summons in Civil Action. Returnable not later than sixty days after service. (Filed Nov. 3, 1944.) James D. Shaw and Van B. Wake, 773 North Broadway, Milwaukee, Wisconsin, Attorneys for Plaintiff. (Rec'd Marshall, U. S. Nov. 1, 1944.)

[fol. 6] IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—1680) • •

ANSWER—Filed March 8, 1945

The defendant admits the averments in paragraphs 1 and 2 of the complaint; admits that electrical energy was furnished by plaintiff to various dairies in and around the cities of Milwaukee and Racine, Wisconsin, as alleged in paragraph 3, but, as concerns the extent, if any, to which the dairies were engaged in pasteurization of milk and as to who bore the burden of tax, defendant avers that it is without knowledge or information sufficient to form a belief as to the truth thereof, but defendant is informed and believes and on information and belief alleges that much of the electrical energy furnished to the said customers was for purposes other than the pasteurization of milk, and except as indicated in this clause, the allegations of paragraph 3 are admitted; admits the allegations of paragraph 4 concerning the filing of the refund claim and its rejection, but expressly denies the allegations of paragraph 4 to the extent, if any, that they imply that electrical energy sold or consumed was exempt from tax; denies paragraph 5.

Wherefore, having fully answered the complaint, the defendant demands that it be dismissed and that costs be awarded to the defendant.

Timothy T. Cronin, United States Attorney, by E.
 J. Koelzer, Assistant United States Attorney, 358
 Federal Bldg., Milwaukee, Wisconsin.

[fol. 7] IN THE DISTRICT COURT OF THE UNITED STATES
(Caption—1680)

PLAINTIFF'S BILL OF PARTICULARS—Filed February 8, 1945

To: Messrs. Timothy T. Cronin, U. S. Attorney, and E. J. Koelzer, Assistant U. S. Attorney, Attorneys for the defendant.

Please Take Notice that the annexed schedule marked "Exhibit A" and incorporated herein by reference is submitted as and for a Bill of Particulars in the above-entitled action, in compliance with the order of the Court entered on January 8, 1945, directing the plaintiff to furnish within thirty days thereafter the names and addresses of all companies and persons engaged in the operation of dairies to whom the plaintiff sold electrical energy in the period of April 1, 1940, to July 31, 1943, and the facts as to the metering of such energy to said companies and persons.

Dated, this 31st day of January, 1945.

James D. Shaw and Van B. Wake, Attorneys for the Plaintiff, by Van B. Wake.

EXHIBIT "A"

Wisconsin Electric Power Company
Milwaukee, WisconsinDairies Engaged in the Pasteurization of Milk Which Were Included in the Claim for Refund
of Electrical Energy Tax Filed May 25, 1944

Dairy Customer	Address	Number of Electric Service Meters	Kind of Service
Borden Co., Gridley Div.	620 N. 8th St., Milwaukee 3, Wisconsin	2	Three-Phase, Direct Current
Emmer Bros. Dairy	2879 N. 30th St., Milwaukee 10, Wis.	2	Three-Phase
Luick Dairy Co.	1132 N. 6th St., Milwaukee 3, Wis.	1	Three-Phase
Clover Lane Dairy Coop.	5042 W. State St., Milwaukee 8, Wis.	2	Three-Phase
Golden Guernsey Dairy Coop.	2206 N. 30th St., Milwaukee 8, Wis.	1	Three-Phase
Blochowiak Dairy Co.	2934-38 S. 9th St., Milwaukee 7, Wis.	1	Three-Phase
Gehl's Guernsey Farms Inc.	3326 W. Capitol Dr., Milwaukee 9, Wis.	1	Three-Phase
Wilke Dairy Co.	3187 N. Booth St., Milwaukee 12, Wis.	2	Single-Phase, Three-Phase
Albert Voigt	2759-A N. 10th St., Milwaukee 6, Wis.	2	Three-Phase
Golden Harvest Dairy Co.	2728 N. 33rd St., Milwaukee 10, Wis.	3	Single-Phase, Three-Phase
Green Valley Guernsey Dairy	1817 S. 72nd St., West Allis 14, Wis.	1	Single-Phase
Layton Park Dairy Co.	2929 W. Forest Home Ave., Milwaukee 7, Wis.	1	Three-Phase
Mike Marciniak	3826 E. Pulaski Ave., Cudahy, Wis.	1	Three-Phase
Leo Galles	116 E. Pier St., Pt. Washington, Wis.	2	Single-Phase
Dairy Distributors Inc.	1609 E. North Ave., Milwaukee 2, Wis.	2	Single-Phase, Three-Phase
Maple Hill Dairy	1827 S. 76th St., West Allis 14, Wis.	3	Single-Phase, Three-Phase
Werking Dairy	513 W. Grand Ave., Pt. Washington, Wis.	2	Single-Phase
Peter Kwecis	734 S. Spring St., Pt. Washington, Wis.	2	Single-Phase
Pabst Farms	Rural Route, Oconomowoc, Wis.	1	Three-Phase
George W. Guenther	Rural Route, West Allis 14, Wis.	1	Single-Phase
Rolland J. Ruby.	Rural Route, Waukesha, Wis.	1	Single-Phase
John Hofmann	Rural Route, Hales Corners, Wis.	1	Single-Phase
Waterford Creamery	Waterford, Wisconsin	2	Three-Phase
Borden Milk & Ice Cream Co.	1010 13th St., Racine, Wisconsin	1	Three-Phase
Cloverleaf Dairy	3344 Douglas Ave., Racine, Wis.	3	Single-Phase, Three-Phase
Progressive Dairy	1214 Lathrop Ave., Racine, Wis.	1	Three-Phase
South Side Dairy	2519 Jerome Blvd., Racine, Wis.	2	Single-Phase
Westfield Dairy	1609 Yout St., Racine, Wisconsin	2	Single-Phase, Three-Phase

STIPULATION OF FACTS—Filed September 25, 1946

The parties hereto, by their respective counsel of record, hereby agree that for the purpose of this litigation and upon any hearing of this cause, the following facts shall be taken to be true. It being further agreed that either party may offer evidence at the hearing tending to establish other facts not inconsistent with those herein stipulated to be true:

1. In this action, the plaintiff, hereinafter at times referred to as the taxpayer, is suing to recover internal revenue taxes levied and collected under the direction of the Commissioner of Internal Revenue, who purported to act under the authority of Section 3411A of the Internal Revenue Code. Plaintiff is a Wisconsin corporation and at all times herein mentioned was engaged in the business of supplying electrical energy to the public in the cities of Milwaukee and Racine, Wisconsin, and in territory adjacent thereto. Its principal office and place of business is in Milwaukee.

2. During the period from April 1, 1940 to July 31, 1943, the taxpayer was supplying electrical energy to certain customers engaged in the dairy business in and about Milwaukee and Racine, Wisconsin. The names of the dairies and the addresses from which their operations are directed are as disclosed in the bill of particulars which has been filed herein (and essentially is duplicated as Exhibit A hereto), which also shows the number of electric service meters through which the electrical energy supplied is measured to the respective customers. Where one meter is shown, all energy consumed at the location indicated, whether for light or for power, is measured through that meter. Where two or more meters are used, the customer, in some cases, takes part of its energy under a refrigeration service rate, which is lower than regular commercial or power service rates, but which refrigeration service rate allows only use of refrigeration equipment, plus 25 per cent thereof of other incidental equipment other than lights. In other cases, [fol. 10] two or more meters may be necessary because the customer has both single phase and three phase power equipment. The separate power meters are not so con-

nected to the load as to enable the energy supplied for one purpose or another in the operations of the dairy plant to be differentiated.

3. The taxes paid by plaintiff in respect of the electrical energy furnished to the customers listed on Exhibit A during the period April 1, 1940 to July 31, 1943 are shown in detail on Exhibit B attached hereto. The rate of tax on and prior to June 30, 1940 was 3%, and thereafter was $3\frac{1}{3}\%$.

4. On May 25, 1944, the taxpayer filed a refund claim with the Collector of Internal Revenue at Milwaukee, demanding refund of the taxes paid as shown by Exhibit B, on the ground that such sales of electrical energy had been erroneously treated in its tax return as sales for domestic and commercial consumption. Thereafter, on October 16, 1944, the Commissioner of Internal Revenue rejected and disallowed that claim for refund.

5. The dairies which consume the electricity make contracts with farm producers at various places in Wisconsin to purchase their milk daily and at other regular intervals. In some instances, as noted in Exhibits D through N, the producers deliver the milk to the dairies. Except as noted in Exhibits D through N, each of the dairies delivers its milk and other dairy products directly to consumers by use of horse-drawn vehicles and trucks. The consumers to whom the products are delivered are regular customers, and the drivers of the vehicles, who are the employees of the dairies, in delivering the milk cover definite territories or routes each day, delivering regularly to each customer on alternate days, except where specific additional deliveries are requested by such customers. Before the war, deliveries were made daily, and sometimes even more frequently. In some instances, as noted in Exhibits D through N, milk and other dairy products are sold and delivered by the dairies for resale, such as to restaurants, hotels and stores. For all these operations, each dairy maintains a fleet of trucks and other vehicles, and drivers. In most cases, the drivers have standing orders to deliver specified amounts of milk each day. In other cases, the amounts are specified at the time of delivery. The drivers also collect for the milk delivered, obtaining payment from some customers in advance for the milk, from some at the time of delivery, and from some by the week.

[fol. 11] 6. The City of Milwaukee, by ordinance, requires that milk sold in the City shall be pasteurized, and the State of Wisconsin has prescribed standards of purity in respect of milk sold within the State. Accordingly, at the various dairies to which the plaintiff sells electrical energy, where the milk is received in bulk and from which it is distributed to consumers in bottles or cans, the milk is pasteurized and tested or examined, in addition to being received, weighed, cooled, bottled, temporarily stored and removed for subsequent delivery.

Milk may contain various bacteria, including those responsible for souring, but also sometimes bacteria or germs derived from unclean conditions in the drawing of milk, the cows themselves, the persons attending them, or the handling or distribution of the milk at the dairies or en route. The purpose of pasteurization is to reduce detrimental bacteria or germs, if they exist, to low tolerances, to prevent the ill consequences which might result to the consumer from their presence.

7. The handling of the milk between receipt and sale involves substantially the following acts in all of the dairies described in Exhibit A, whether the milk is brought to the plant directly from the dairy's own cows (instances of this will appear below or in the exhibits attached hereto), or from milk stations or country milk routes:

If the weather is so unfavorable as to require it, the milk is cooled immediately to temperature to which it will be best kept after it has been weighed and tested for butter fat. The milk is then mixed and standardized, i. e., by adding richer or leaner milk (in butter fat content) as may be indicated. Except when the exhibit may specifically show some sale of unpasteurized milk, the milk is next pasteurized.

Pasteurization is ordinarily accomplished by passing the milk from the receiving vats through pipes to vats which are heated to approximately 140-145 degrees F., which is less than boiling. This temperature is maintained for 30 minutes and then the milk is passed over cooling coils and thereby chilled to about 40 degrees before it is further handled. In the course of pasteurizing milk, the temperature is carefully checked and maintained at the desired level.

After leaving the pasteurization vats and coolers, the milk comes to tanks, from which it is drawn to be bottled, except as it is sold in cans to large users or enters into

by-products. The bottles or cans have been washed, sterilized and cooled. After bottling, it is stored from several hours to a day to permit the cream line to form and to await delivery. It continues in this cold storage until sale or distribution. Such cold storage rooms are maintained at approximately 40 degrees temperature.

8. All of the "plants", including the offices, and garage space for collecting and distributing trucks, are lighted. In each plant, electric motors are used for some or all of the following purposes: for pumping refrigerants, for delivering milk to, through and from the pasteurizers by pumps as necessary, for operating the homogenizer, where there is one, as shown in the Exhibits, for delivering milk to the bottling machines, for operating the bottling machine, for operating cream separators, and for operating some of the machinery used in washing, sterilizing and conveying bottles. The larger dairies differ from the smaller ones chiefly in the number of units available for different operations, such as a larger number of pasteurizing vats, more bottling machines, etc. As to several of the dairies where there may be additional uses of electricity, the data will be found in Exhibits D to N, referred to in the next paragraph hereof.

9. Exhibits D to N, attached hereto, relate specifically to some one dairy involved in this case, and the following subjects, among others, are covered:

The quantity of milk received by the dairy on the average day during the period involved in this lawsuit.

The number of motors in use during the period, showing their function.

The gross receipts of the business in a typical year, and the percentages thereof applicable generally to sales, during the period involved, in respect of the various products delivered and sold to customers.

The daily yield of the plant during the period covered.

Variations from the normal situation as described in Paragraphs 7 and 8 hereof, and in Exhibit C.

Total personnel and duties assigned.

10. No specific exhibit has been prepared with respect to the following dairies:

1. Borden Co., Gridley Division.
2. Clover Lane Dairy Coop.

3. Gehl's Guernsey Farms, Inc.
4. Wilke Dairy Co.
5. Albert Voight.
6. Golden Harvest Dairy Co.
7. Green Valley Guernsey Dairy.
- [fol. 13] 8. Mike Marciniak.
9. Dairy Distributors, Inc.
10. Maple Hill Dairy.
11. Werking Dairy.
12. Peter Kweeis.
13. George W. Guenther.
14. John Hofmann.
15. Waterford Creamery.
16. Cloverleaf Dairy.
17. Progressive Dairy.

In respect to these, no differentiating factor was found from one or more of the dairies covered more completely. It has been agreed that as to dairy numbered 1, above, the specific information as supplied in Exhibit E may be applied to it as sufficiently accurate; as to dairies numbered 2, 4, and 15, the information in Exhibit H may be applied; as to dairies numbered 3, 9 and 17, the information in Exhibit G; as to dairies numbered 5, 6, 10 and 16, the information in Exhibit D; as to dairies numbered 7, 11, 12 and 13, the information in Exhibit N; as to dairy numbered 8, the information in Exhibit I; and as to dairy numbered 14, the information in Exhibit K.

11. From studies in several dairies here involved, and comparison with statistics relating to dairy costs generally, it may be taken as true that in all the dairies named in Exhibit A, except Pabst Farm, the cost of raw milk is approximately 9.6 cents per quart; of plant operations (as described in this stipulation in the light of the various exhibits) about 1 cent per quart; and of distributing bottled milk and other products, about 4 cents per quart.

12. For purposes of this litigation, it is agreed that the plaintiff has not included the tax in the cost of the electrical energy with respect to which it was imposed, nor collected the amount of the tax from the vendee.

Dated this 25th day of September, 1946.

(Signed) Van B. Wake, Attorney for Plaintiff, United States of America. (Signed) Timothy T. Cronin, United States Attorney. (Signed) William B. Waldo, Special Assistant to the Attorney General. (Signed) Philip R. Miller, Special Assistant to the Attorney General, Attorneys for Defendant.

EXHIBIT "A"

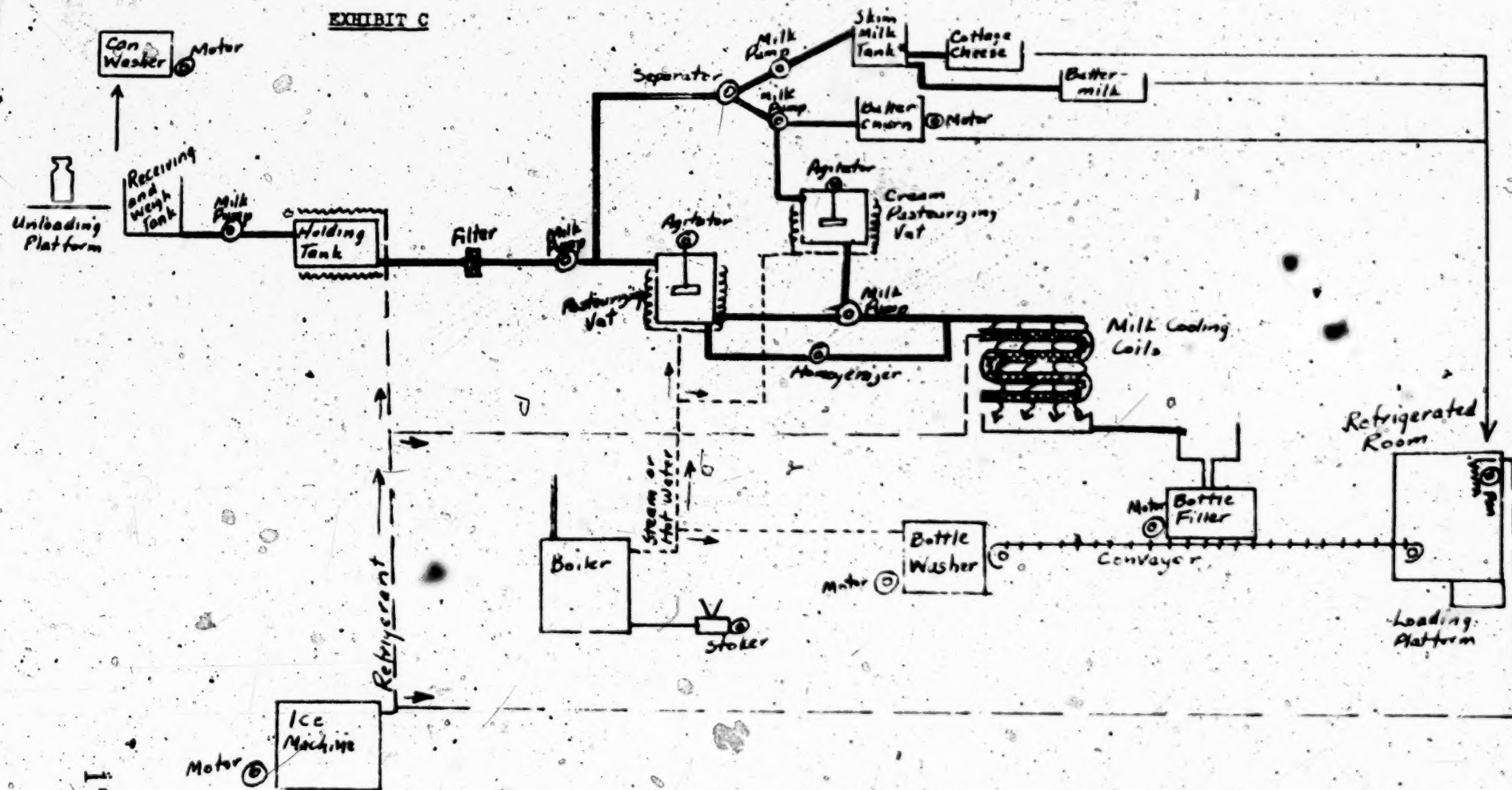
Wisconsin Electric Power Company
Milwaukee, Wisconsin

Dairies Included in the Claim for Refund of Electrical Energy Tax Filed May 25, 1944

Dairy Customer	Address	Number of Electric Service Meters	Kind of Service
Borden Co., Gridley Div.	620 N. 8th St., Milwaukee 3, Wisconsin	2	Three-Phase, Direct Current
Emmer Bros. Dairy	2879 N. 30th St., Milwaukee 10, Wis.	2	Three-Phase
Luick Dairy Co.	1132 N. 6th St., Milwaukee 3, Wis.	1	Three-Phase
Clover Lane Dairy Coop.	5042 W. State St., Milwaukee 8, Wis.	2	Three-Phase
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Blochowiak Dairy Co.	2934-38 S. 9th St., Milwaukee 7, Wis.	1	Three-Phase
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Wilke Dairy Co.	3167 N. Booth St., Milwaukee 12, Wis.	2	Single-Phase, Three-Phase
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Leo Galles	116 E. Pier St., Pt. Washington, Wis.	2	Single-Phase
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Rolland J. Ruby	Rural Route, Waukesha, Wis.	1	Single-Phase
John Hofmann	Rural Route, Hales Corners, Wis.	1	Single-Phase
Waterford Creamery	Waterford, Wisconsin	2	Three-Phase
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Progressive Dairy	1214 Lathrop Ave., Racine, Wis.	1	Three-Phase
South Side Dairy	2519 Jerome Blvd., Racine, Wis.	2	Single-Phase
Westfield Dairy	1609 Yout St., Racine, Wisconsin	2	Single-Phase, Three-Phase

photo,

EXHIBIT C



NOTE: One milk pump may perform one or more of the above-indicated pumping operations if portable milk pumps are used or if suitable piping connections are installed.

- Skim milk is also pasteurized; either in the skim milk tank or in one of the other pasteurizing vats.

[fol. 19].

EXHIBIT D

Emmer Bros. Dairy, 2879 North 30th Street, Milwaukee,
Wisconsin

Scope of Business

This dairy is engaged in the business of purchasing, pasteurizing, bottling, keeping refrigerated and selling and distributing milk and cream. Some cottage cheese and chocolate milk are also prepared and sold. The milk received at this plant is purchased from farms and is collected by two trucks owned by Emmer Bros. The output of this plant is sold entirely to homes and is delivered by eleven trucks owned by the dairy.

Daily Receipts of Milk: 10,000 lbs. milk.

Daily Yield of Plant: Pasteurized milk and
cream—80 per cent. Cottage cheese and choco-
late milk—20 per cent

Gross Receipts per Year: \$200,000

Employees: Office and Plant

Distribution

4

10

Total

—
14

[fol. 20]

EXHIBIT D

EMMER BROTHERS DAIRY
2879 North 30th Street
Milwaukee, Wisconsin

No. of Units	*Machines	Rated Horse- power Output	Equiva- lent Kilowatt Input	Esti- mated Hours Daily Use	**Kilowatt-Hrs. Daily Consumption
	Milk Receiving				
1	Milk can washer.....	1/4	0.2	2	0.4
1	Milk pump—receiving tank to pas- teurizing vats.....	1/4	0.2	2	0.4
					0.8
	Cream Separation				
1	Cream separator.....	1/2	0.4	3	1.2
	Pasteurization (Excl. of cooling and unassigned plant operations)				
3	Pasteurizing vats—agitator.....	3/4	0.7	3	2.1
1	Milk pump—through cooling coils	1/4	0.2	6	1.2
1	Brine pump—through cooling coils	2	1.7	3	5.1
					8.4
	Cooling For Pasteurization, Ageing and Holding				
1	Ice machine—milk cooling coils and refrigerator.....	25	21.5	8	172.0
1	Brine pump—to refrigerator.....	1	0.9	12	10.8
3	Circulating fans in refrigerator.....	3/8	0.3	8	2.4
					185.2
	Cottage Cheese Manufacture				
1	Cheese grinder.....	3/4	0.7	5	0.4
	Bottle Washing and Bottling				
1	Bottle washer.....	3 1/4	2.8	6	16.8
1	Bottle filler.....	1/4	0.2	6	1.2
1	Bottle conveyor.....	1/4	0.2	6	1.2
					19.2
	Boiler Room (Steam or hot water for pasteurizing, bottle washing and plant heating)-				
1	Stoker.....	3/4	0.7	3	2.1
1	Hot water pump.....	1	0.9	1	.9
					3.0
	Lighting				
	Entire plant lighting.....		2.5	6	15.0
	Total.....				233.2

Note: Based on operations in August, 1946.

* Both parties reserve the right to show that the categories in which the devices or motors are placed above do not properly reflect their functions.

** The Kilowatt-Hours Daily Consumption represents the Rated Horsepower Output of each motor times the estimated Hours of Daily Use and does not necessarily represent actual kilowatt hour consumption.

[fol. 21]

EXHIBIT E

Luick Dairy Company
1132 North 6th Street
Milwaukee, Wisconsin

Scope of Business

This dairy is engaged in the business of receiving, pasteurizing, bottling and keeping refrigerated and selling and distributing of milk and cream. Some milk is homogenized. The customer also prepares smaller quantities of buttermilk and cottage cheese. Butter is churned during parts of the year, but none was being churned at the time of the inspection. It also sells chocolate milk and orange drink, which it prepares by mixing with concentrates which it purchases. This company also has three distribution branches at other locations in the city, for which no exemption from tax is claimed, and part of each day's output of this plant is delivered to these three distribution branches after being bottled or packaged. All products remaining at this plant are loaded on route wagons for distribution throughout the city and suburbs to route customers, and there is no retail store on the premises. Approximately forty per cent of the sales represent wholesale sales. The milk received at this plant is purchased from farmers and is delivered directly to this location by the farmer or other hauler.

Daily Receipts of Milk:	175,000 lbs. Milk (20,000 gals.)
Daily Yield of Plant:	Pasteurized milk, 16,500 gals.
	(includes 4,500 gals. also homogenized.)
	Pasteurized cream, 800 gals.
	Buttermilk, 500 gals.
	Cottage cheese, 1300 lbs.
	Chocolate milk, 1300 gals.
	Orange drink, 500 gals.
	Butter (none at time of inspection.)

Employees:	Office and sales	42
	Plant operation	107
	Distribution operating from this location	71
	Total at this location	220
	Distribution operating from branches	150

EXHIBIT E

LUICK DAIRY COMPANY

1132 North 6th Street
Milwaukee, Wisconsin

No. of Units	*Machines	Rated Horse- power Output	Equiva- lent Kilowatt Input	Esti- mated Hours Daily Use	**Kilowatt-Hrs. Daily Consumption
Milk Receiving					
1	Milk can elevator	7½	6.5	5.5	35.8
1	Pump at weigh tank	2	1.7	5.5	9.4
1	Air compressor on weigh tank	2	1.7	5.5	9.4
2	Can washer pump	10	8.6	5.5	47.3
1	Milk pump—to holding tanks	1	0.9	1	.9
1	Milk pump—through cooler to holding tanks	2	1.7	4	6.8
Cream Separation					
1	Agitator on holding tank for sepa- rator	1½	1.3	6	7.8
1	Milk pump—to separator	2	1.7	5	8.5
1	Cream separator	5	4.3	3	12.9
Pasteurization (Exclusive of cooling and unassigned plant operations)					
4	Pasteurizing vats—agitators	6	5.2	9.5	49.4
1	Air compressor—controls on pas- teurizing vats	½	0.4	2	0.8
3	Holding tanks—agitators	4	3.4	6	20.4
4	Holding tanks—agitators	6½	5.6	8	44.8
1	Milk pump—into pasteurizing vats	3	2.6	5	13.0
2	Milk pumps—out of pasteurizing vats through cooling coils	4	3.4	5	17.0
1	Cream pasteurizing vat—agitator	1	0.9	8	7.2
2	Milk pumps—cream through cool- ing coils	4	3.4	5	17.0
1	Cream vat—cooling cream after heated for pasteurizing	1½	1.3	3	3.9
1	Cream pasteurizing vat—agitator and pump	1½	1.3	5	6.5
1	Skim milk pasteurizing vat— agitator and pump	1½	1.3	5	6.5
1	Milk pump—cream and skim milk through cooling coils	1	0.9	5	4.5
2	Hot water pumps	15	12.9	10	129.0
1	Hot water pump	½	0.4	4	1.6
Milk Homogenizing					
1	Homogenizer	20	17.2	1	17.2
1	Homogenizer	40	34.4	2	68.8
1	Separator for Homogenizers	3	2.6	2	5.2
By-Products Manufacture					
2	Butter churns (used intermittently)	6			
1	Cottage cheese starter tank	¼	0.2	3	0.6

* Both parties reserve the right to show that the categories in which the devices or motors are placed above do not properly reflect their functions.

** The Kilowatt-Hours Daily Consumption represents the Rated Horsepower Output of each motor times the estimated Hours of Daily Use and does not necessarily represent actual kilowatt hour consumption.

[fol. 23]

EXHIBIT E (Continued)
LUICK DAIRY COMPANY
 1132 North 6th Street
 Milwaukee, Wisconsin

No. of Units	Machines	Rated Horse- power Output	Equiva- lent Kilowatt Input	Esti- mated Hours Daily Use	Kilowatt-Hrs. Daily Consumption
4	Agitators and pumps on 2 vats for making orange drink and pasteurizing skim milk	3	2.6	5	13.0
2	Agitators on vats for pasteurizing chocolate milk	3	2.6	4	10.4
1	Holding tank—skim milk	1½	1.3	3	3.9
1	Buttermilk pasteurizing vat	1½	1.3	3	3.9
					31.8
	Cooling for pasteurization, Ageing and Holding				
1	Ice machine	40	34.4	7	240.8
1	Generator set for Ice machine	6½	5.6	7	39.2
2	Ice Machines	100			
1	Brine pump	15	12.9	16	206.4
1	Brine pump	25			
1	Brine tank agitator	2	1.7	16	27.2
2	Cooling units in refrigerator	3¾	3.3	15	49.5
					563.1
	Bottle Washing, Bottling and Handling				
2	Motors on bottle washer	4	8.4	9	30.6
1	Motors on bottle washer	7½	6.5	12	78.0
3	Storage tanks—after pasteurization, before bottling	4½	3.8	3.5	13.3
6	Motors on bottle fillers	2	1.7	10	17.0
2	Hooding machines	1¾	1.1	10	11.0
2	Case conveyors	2	1.7	10	17.0
1	Case conveyor	3	2.6	12	31.2
2	Case conveyors	4	3.4	9	30.6
1	Solution pump—for pipe cleaning	2	1.7	3	5.1
1	Pipe washing tank pump	½	0.4	3	1.2
					235.0
	Boiler Room (Hot water or steam for pasteurizing, bottle and can washing and plant heating)				
3	Stokers	4	3.4	10	34.0
1	Boiler fan	3	2.6	10	26.0
					60.0
	Freight Elevator				
1	Elevator motor	7½	6.5	3	19.5
	Ventilating and Heating				
9	Unit fans	9¾	8.4	4	33.6
4	Heaters	¾	0.6	4	2.4
2	Blower	6	5.2	7	36.4
					72.4
	Lighting				
	Entire plant lighting		30	12	360.0
	Total				1,893.4

Note: Based on operations in December, 1945.

* Both parties reserve the right to show that the categories in which the devices or motors are placed above do not properly reflect their functions.

** The Kilowatt-Hours Daily Consumption represents the Rated Horsepower Output of each motor times the estimated Hours of Daily Use and does not necessarily represent actual kilowatt hour consumption.

Golden Guernsey Dairy Coop.

2206 North 30th Street

Milwaukee, Wisconsin

Scope of Business

This dairy is a cooperative company organized in 1930, owned by the milk producers and is engaged in the business of bringing, receiving, pasteurizing, bottling, keeping refrigerated, and selling and delivering of milk and cream. The milk is purchased from the producers and is collected by five dairy-owned trucks and twelve trucks owned by the producers. Some milk is homogenized. The customer also prepares powdered skim milk, butter, cottage cheese, buttermilk, and mixes from concentrates chocolate milk. The products of this plant are distributed entirely to homes by 140 trucks owned by the dairy.

Daily Receipts of Milk: 145,000 lbs. milk.

Daily Yield of Plant: Pasteurized milk and cream, approximately 127,000 lbs.

Buttermilk, 2,500 lbs.
 Powdered skim milk, 1,000 lbs.
 Cottage cheese, 10,000 lbs.
 Butter, 1,500 lbs.
 Chocolate milk, 3,000 lbs.

Gross Receipts per Year:

\$3,500,000.00

Milk	63%
Cream	12%
Butter	20%
Buttermilk	
Chocolate Milk	
Powdered skim milk	
Cottage Cheese	5%

100%

Employees:

Office	20
Plant Operation	60
Distribution	150
Total	230

[fol. 25]

EXHIBIT F

GOLDEN GURNSEY DAIRY CO-OPERATIVE
 2206 North 30th Street
 Milwaukee, Wisconsin

No. of Units	*Machines	Rated Horse- power Output	Equiva- lent Kilowatt Input	Esti- mated Hours Daily Use	**Kilowatt-Hrs. Daily Consumption
Milk Receiving					
3	• Milk can washers and dryer	12½	10.7	5	53.5
1	Milk can conveyor	2	1.7	5	8.5
2	Milk pumps—in receiving room	3	2.6	5	13.0
					75.0
Cream Separation					
2	Cream separators	4	3.4	5	17.0
1	Separator pump	1	0.9	5	4.5
1	Laboratory testing machine	¼	0.2	4	0.8
					22.3
Pasteurization (Excl. of cooling and unassigned plant operations)					
3	Large pasteurizing vats — Hot water pumps and agitators	5	4.3	9	38.7
9	Small pasteurizing vats — Hot water pumps and agitators	3¼	2.8	8	22.4
2	Separate agitators on small pasteurizing vats	½	0.4	8	3.2
5	Holding tank agitators	10	8.6	9	77.4
2	Milk pumps	2¾	2.4	9	21.6
2	Portable milk pumps	1	0.9	4	3.6
2	Cream pasteurizing vats—agitators	1¼	1.1	1	1.1
1	Cream pasteurizing vats — Hot water pump	3	2.6	1	2.6
					170.6
Cooling for pasteurization, Ageing and Holding					
1	Ice Machine—Milk cooling coils	50	43.00	7	301.0
1	Ice Machine—Milk cooling coils	25	21.5	16	344.0
1	Ice Machine—Refrigerator cooling	40	34.4	12	412.8
3	Circulating fans in refrigerator	6	5.2	24	124.8
					1182.6
Milk Homogenizing					
1	Homogenizer	40	34.4	4	137.6
Butter Manufacture					
1	Butter churn	3	2.6	3	7.8
1	Butter cutter and packager	¼	0.2	6	1.2
					9.0
Powdered Skim Milk Manufacture					
4	Motors on skim milk dryer	10¾	9.3	8	74.4
Buttermilk and Cottage Cheese Manufacture					
3	Buttermilk and cottage cheese pasteurizing vats	3	2.6	4	10.4
2	Hot water pumps	8	6.9	4	27.6
1	Cottage cheese grinder	1	0.9	1	.9
1	Cottage cheese filler	¼	0.2	5	1.0
					39.9

* Both parties reserve the right to show that the categories in which the devices or motors are placed above do not properly reflect their functions.

** The Kilowatt-Hours Daily Consumption represents the Rated Horsepower Output of each motor times the estimated Hours of Daily Use and does not necessarily represent actual kilowatt hour consumption.

EXHIBIT F (Continued)

GOLDEN GURNSEY DAIRY CO-OPERATIVE

2206 North 30th Street

Milwaukee, Wisconsin

No. of Units	*Machines	Rated Horse- power Output	Equiva- lent Kilowatt Input	Esti- mated Hours Daily Use	**Kilowatt-Hrs. Daily Consumption
Bottle Washing, Bottling and Handling					
2	Bottle Conveyors — to Bottle washers	4	3.4	12	40.8
1	Bottle Conveyors — to bottle washers	1	0.9	2	1.8
2	Bottle Washers—water pumps	15	12.9	9	116.1
2	Bottle Washers—motor drive	2	1.7		15.3
1	Case washer	2	1.7	9	15.3
1	Small delivery can washer	1	0.9	4	3.6
2	Bottle fillers	2	1.7	9	15.3
1	Bottle capper	1	0.9	1	0.9
1	Bottle capper	1 $\frac{1}{4}$	0.2	4	0.8
3	Conveyors in refrigerator	7	6.0	12	72.0
					281.9
Water Supply					
1	Deep well pump	25	21.5	18	387.0
Boiler Room (Steam or hot water for pasteurizing, bottle and can washing and plant heating)					
1	Oil burner	7 $\frac{1}{2}$	6.5	14	91.0
1	Oil burner	1	0.9	18	16.2
1	Oil burner	5	4.3	10	43.0
1	Boiler oil feed	1	0.9	3	2.7
1	Boiler—make-up water pump	5	4.3	4	17.2
1	Hot water pump	3 $\frac{1}{4}$	0.7	3	2.1
1	Hot water pump	5	4.3	1	4.3
1	Condensate pump	1 $\frac{1}{2}$	0.4	3	1.2
					177.7
Freight Elevator					
1	Elevator motor	7 $\frac{1}{2}$	6.5	3	19.5
Garage					
1	Air compressor	3	2.6	8	20.8
	Miscellaneous Shop Tools	1	0.9	4	3.6
					24.4
Heating and Ventilating					
6	Garage	3	2.6	2	5.2
2	Receiving Room	1 $\frac{1}{2}$	1.3	5	6.5
2	Plant	2	1.7	14	23.8
1	Office	2	1.7	24	40.8
1	Air conditioning compressor	5	4.3	8	34.4
					110.7
Lighting					
	Office, garage, receiving room and laboratory lighting		30	12	360.0
	Plant lighting		12.5	12	150.0
	Cottage cheese and buttermilk room lighting		2.5	8	20.0
					530.0
Total					3242.6

Note: Based on operations in August, 1946.

* Both parties reserve the right to show that the categories in which the devices or motors are placed above do not properly reflect their functions.

** The Kilowatt-Hours Daily Consumption represents the Rated Horsepower Output of each motor times the estimated Hours of Daily Use and does not necessarily represent actual kilowatt hour consumption.

[fol. 27]

EXHIBIT G

Blochowaik Dairy Co.
2934-38 South 9th Street
Milwaukee, Wisconsin

Scope of Business

This dairy is engaged in the business of purchasing, pasteurizing, bottling, keeping refrigerated, and selling and delivering, of milk and cream. Some milk is homogenized. The customer also prepares butter, cottage cheese, and mixes with concentrates — chocolate milk. The milk received at this plant is purchased from farmers and is delivered to the plant by the producers. Occasionally some milk and cream is purchased from other dairies to supply an unusual demand. Eighty per cent of sales are made to homes. Delivery of the finished products is made to homes, stores and restaurants with thirty trucks and wagons owned by the dairy.

Daily Receipts of Milk: 35,000 lbs. of milk.

Daily Yield of Plants: Pasteurized milk and cream—
70%

Butter	}	30%
Cottage Cheese		
Chocolate Milk		

Employees:

Office	7
Maintenance & Repair	7
Plant Operation	22
Distribution	36
Total	72

[fol. 28]

EXHIBIT G

BLOCHOWIAK DAIRY COMPANY

2934-38 South 9th Street

Milwaukee, Wisconsin

No. of Units	*Machines	Rated Horse- power Output	Equiva- lent Kilowatt Input	Esti- mated Hours Daily Use	**Kilowatt-Hrs. Daily Consumption
	Milk Receiving				
1	Milk can washer	2	1.7	3.5	6.0
1	Milk pump	3	2.6	3.5	9.1
	Cream Separation				
1	Cream separator	2	4.7	1.5	2.6
	Pasteurization (Exclusive of cooling and unassigned plant operations)				
5	Pasteurizing vats—agitators	11¼	1.1	3	3.3
1	Preheater pump	2	1.7	6	10.2
2	Holding tank agitators	2	1.7	5	8.5
2	Milk pumps—through cooling coils	1½	0.4	6	2.4
1	Ultra violet lights—over cooling coils		4.0	4	16.0
	Cooling for Pasteurization, Ageing and Holding				
1	Ice machine — combined cooling system	30	25.8	10	258.0
1	Ice machine — combined cooling system	30	25.8	1	25.8
1	Ice machine — combined cooling system	7½	6.5	14	91.0
1	Refrigerator blower	1	0.9	10	9.0
	Milk Homogenizing				
1	Homogenizer	25	21.5	1.25	26.9
1	Homogenizer	5	4.3	.25	1.1
	Butter Manufacture				
1	Butter churn	5	4.3	1	4.3
1	Butter cutter and packager	1	0.9	1	0.9
	Cottage Cheese Manufacture				
3	Vat agitators	6	5.2	3	15.6
1	Cottage cheese grinder	1½	0.4	.5	0.2

* Both parties reserve the right to show that the categories in which the devices or motors are placed above do not properly reflect their functions.

** The Kilowatt-Hours Daily Consumption represents the Rated Horsepower Output of each motor times the estimated Hours of Daily Use and does not necessarily represent actual kilowatt hour consumption

[fol. 29]

EXHIBIT G (Continued)

BLOCHOWIAK DAIRY COMPANY
 2934-38 South 9th Street
 Milwaukee, Wisconsin

No. of Units	*Machines*	Rated Horse- power Output	Equiva- lent Kilowatt Input	Esti- mated Hours Daily Use	**Kilowatt-Hrs. Daily Consumption
Bottle Washing and Bottling					
1	Bottle washer	2	1.7	6	10.2
1	Bottle filler	3/4	0.7	6	4.2
1	Vacuum pump for bottle filler	1 1/2	1.3	6	7.8
1	Bottle capper	1 1/2	0.3	6	1.8
1	Bottle capper	1 1/2	0.3	3	0.9
1	Case conveyor	1 1/2	0.2	6	1.2
					26.1
Water Supply					
1	Deep well pump	15	12.9	6	77.4
1	High pressure water pump	5	4.3	11	47.3
					124.7
Boiler Room (Steam or hot water for pasteurizing, bottle and can washing and plant heating)					
1	Stoker	1 1/2	1.3	3	3.9
2	Oil burner	3	2.6	3	7.8
2	Condensate pumps	4	3.4	2	6.8
1	Sump pump	1/4	0.2	5	0.1
					18.6
Freight Elevator					
1	Elevator motor	5	4.3	1	4.3
Garage					
	Miscellaneous tools	1	0.9	25	0.2
1	Air compressor	3	2.6	3.5	9.1
					9.3
Ventilating and Heating					
1	Unit fans—receiving room	1/8	0.1	8	0.8
1	Unit fans—Cheese room	1/8	0.1	8	0.8
1	Unit fans—pasteurizing room	1/8	0.1	8	0.8
2	Unit fans—garage and repair shop	1/8	0.3	2	0.6
1	Unit fans—cooling room	1/4	0.2	6	1.2
2	Ventilators	1/2	0.4	6	2.4
					6.6
Lighting					
	Entire plant lighting		15	6	90.0

Total

770.5

Note: Based on operations in August, 1946.

* Both parties reserve the right to show that the categories in which the devices or motors are placed above do not properly reflect their functions.

** The Kilowatt-Hours Daily Consumption represents the Rated Horsepower Output of each motor times the estimated Hours of Daily Use and does not necessarily represent actual kilowatt hour consumption.

EXHIBIT H

Layton Park Dairy Co., 2929 West Forest Home Avenue,
Milwaukee, Wisconsin

Scope of Business

This dairy is engaged in the business of purchasing, pasteurizing, bottling, keeping refrigerated, selling and delivering, of milk and cream. Some milk is homogenized. The dairy also prepares butter, cottage cheese, buttermilk, prepares from concentrates chocolate milk and orange drink. All the milk is delivered to the plant by the producers. Delivery of the finished products is made from this plant by the customer's vehicles, fifteen trucks and five horse-drawn wagons. Twenty-five per cent of the output is sold at wholesale and seventy-five per cent is delivered to homes. There are eighteen retail routes and two wholesale.

Daily Receipts of Milk: 30,000 lbs. of milk.

Daily Yield of Plant: Pasteurized Milk and Cream—70%.

Butter, Cottage Cheese, Buttermilk, Chocolate-Milk, Orange Drink—30%.

Gross Receipts For Year: \$620,000.

Employees:

Office	7
Plant	15
Distribution	27
	—
Total	49

[fol. 31]

EXHIBIT H

LAYTON PARK DAIRY CO.
2929 West Forest Home Avenue.
Milwaukee, Wisconsin

No. of Units	*Machines	Rated Horse- power Output	Equiva- lent Kilowatt Input	Esti- mated Hours Daily Use	**Kilowatt-Hrs. Daily Consumption
	Milk Receiving				
1	Milk can washer.....	2	1.7	2.5	4.3
1	Milk pump—receiving tank to holding tanks.....	1	0.9	3.5	3.2
					7.5
	Cream Separation				
1	Cream separator.....	3	2.6	2	5.2
1	Separator pump.....	1½	1.3	2	2.6
1	Cream tester.....	¼	0.2	.5	0.1
					7.9
	Pasteurization (Exclusive of cooling and unassigned plant operations)				
4	Pasteurizing vats—agitators.....	1¼	1.1	4	4.4
1	Milk pump—holding tanks to pas- teurizer vats.....	1	0.9	4	3.6
1	Milk pump—through cooling coils.....	1	0.9	3.5	3.2
3	Holding tank agitators.....	1½	1.3	2	2.6
2	Cream pasteurizing vats.....	¾	0.6	2	1.2
1	Hot water pump.....	3	2.6	4	10.4
					25.4
	Milk Homogenizing				
1	Homogenizer.....	15	12.9	1.3	16.8
	Cooling for Pasteurization, Ageing and Holding				
1	Ice machine—combined cooling system.....	15	12.9	9.5	122.6
1	Ice machine—combined cooling system.....	15	12.9	3	38.7
1	Ice machine—combined cooling system.....	25	21.5	1	21.5
1	Cold water pump.....	3	2.6	2	5.2
					188.0
	Butter Manufacture				
1	Butter churn.....	3	2.6	1.5	3.9
1	Butter packager.....	1	0.9	2	1.8
					5.7
	Buttermilk and Cottage Cheese Manufacture				
1	Buttermilk vat.....	¾	0.3	2	0.6
1	Cottage cheese tank agitator.....	¼	0.2	1	0.2
1	Cottage cheese grinder.....	1	0.9	.5	0.5
					1.3

* Both parties reserve the right to show that the categories in which the devices or motors are placed above do not properly reflect their functions.

** The Kilowatt-Hours Daily Consumption represents the Rated Horsepower Output of each motor times the estimated Hours of Daily Use and does not necessarily represent actual kilowatt hour consumption.

[fol. 32]

EXHIBIT H (Continued)

LAYTON PARK DAIRY CO.
2929 West Forest Home Avenue
Milwaukee, Wisconsin

No. of Units	*Machines	Rated Horse- power Output	Equiva- lent Kilowatt Input	Esti- mated Hours Daily Use	**Kilowatt-Hrs. Daily Consumption
	Bottle Washing, Bottling and Handling.				
1	Bottle washer.....	1	0.9	4	3.6
1	Bottle filler.....	1	0.9	4.5	4.1
1	Vacuum pump on bottle filler.....	1/4	0.2	4.5	0.9
1	Milk pump—to skim milk tank for disposal.....	1	0.9	.5	0.5
	Boiler Room. (Steam or hot water for pasteurizing, bottle and can washing and plant heating)				
1	Stoker.....	1	0.9	5	4.5
1	Freight Elevator				
1	Elevator Motor.....	5	4.3	1	4.3
	Garage				
1	Air compressor—for tires.....	1	0.9	.25	0.2
	Lighting				
	Entire plant lighting.....		10	6	60.0
	Total.....				330.7

Note: Based on operations in August, 1946.

* Both parties reserve the right to show that the categories in which the devices or motors are placed above do not properly reflect their functions.

** The Kilowatt-Hours Daily Consumption represents the Rated Horsepower Output of each motor times the estimated Hours of Daily Use and does not necessarily represent actual kilowatt hour consumption.

[fol. 33]

EXHIBIT I

Leo Galles (Port Washington Dairy), 116 East Pierce
Street, Port Washington, Wisconsin

Scope of Business

This dairy is engaged principally in the business of purchasing, pasteurizing, bottling, keeping refrigerated, selling and distributing milk and cream. He also purchases ice cream mix from a creamery, which is then flavored and frozen at the dairy plant. A small quantity of chocolate milk is also prepared from a concentrate. A retail store maintained in the front of the plant building sells about 25 per cent of the ice cream and a very small per cent of the milk pasteurized and bottled. One truck, company owned, is used to collect milk from the producers and another truck is used for delivery.

Daily Receipts of Milk: 1,200 lbs. milk.

Daily Yield of Plant: Pasteurized Milk—96 per cent.

Chocolate Milk—4 per cent.

Gross Receipts Per year: Milk \$17,850

Ice Cream 7,650

Total \$25,500

Employees:

Office and Plant 3

Collection 1

Distribution 1

Total 5

[fol. 34]

EXHIBIT I

LEO GALLES
116 East Pier Street
Port Washington, Wisconsin

No. of Units	*Machines	Rated Horse- power Output	Equiva- lent Kilowatt Input	Esti- mated Hours Daily Use	**Kilowatt-Hrs Daily Consumption
1	Milk Receiving				
	Milk pump—weigh tank to pas- teurizing vat.....	1/4	0.2	1	0.2
1	Cream separation				
	Cream separator.....	1/2	0.3	2	0.6
	Pasteurization (Exclusive of cooling and unassigned plant operations)				
1	Pasteurizing vat.....	1/4	0.2	2.5	0.5
1	Milk pump—through cooling coils.....	1/4	0.2	2.5	0.5
1	Brine pump—through cooling coils.....	1/4	0.2	2	0.4
	Cooling For—Pasteurization; Ageing and Holding				
1	Ice Machine—Milk cooling coils and refrigerator.....	1 1/2	1.3	20	26.0
	Ice Cream Manufacture				
1	Ice cream mixing machine.....	1/2	0.4	2.5	1.0
1	Ice cream freezing machine and freezing cabinet.....	2	1.7	12	20.4
1	Ice machine—Ice cream finish freezing and holding.....	1 1/2	1.3	20	26.0
	Bottle Washing and Bottling				
1	Bottle washer.....	2	1.7	4	6.8
1	Bottle filler.....	1/2	0.3	2	0.6
	Heating and Ventilating				
1	Unit fan.....	1/4	0.2	4	0.8
	Lighting				
	Entire building lighting.....				2.6
	Total.....				85.8

Note: Based on operations in August, 1946.

* Both parties reserve the right to show that the categories in which the devices or motors are placed above do not properly reflect their functions.

** The Kilowatt-Hours Daily Consumption represents the Rated Horsepower Output of each motor times the estimated Hours of Daily Use and does not necessarily represent actual kilowatt hour consumption.

[fol. 35]

EXHIBIT J

Pabst Farm, Rural Route, Oconomowoc, Wisconsin

Scope of Business

This dairy is engaged in the business of producing, purchasing and separating milk, pasteurizing the cream, and producing condensed skim milk and powdered skim milk, and keeping refrigerated and selling them. At this location and included in this account are the buildings used for receiving and processing the milk and also the barns in which the customer's milk cows are kept. This customer account is one set of buildings located on a farm of 1,300 acres which contains several other sets of buildings. Practically all farming operations for this farm are conducted from locations other than the one discussed herein. Besides the milk received from the customer's herd of about 200 cows, the milk is also purchased from 210 other dairy farms. The output of this plant is sold mostly to the United States Government and to the bakery trade and ice cream manufacturers. A large portion of these sales is made in Chicago. All milk received was separated. The cream obtained is pasteurized but it is not necessary to pasteurize the skim milk because of the high temperature involved in processing the skim milk.

Daily Receipts of Milk—1944: 33,190,908 lbs. of milk.

Cream separated 3,257,545 pounds

Skim milk from separation 29,933,363 pounds

Yield of skim milk from separation—1944:

Powdered skim milk 14,269,992 lbs.

Sweetened condensed skim 1,530,353 lbs.

Superheated manufactured skim 5,406,335 lbs.

Three to one manufactured skim 4,233,540 lbs.

Skim milk sold 4,313,405 lbs.

Skim milk loss 144,738 lbs.

Held over 35,000 lbs.

Total

29,933,363 lbs.

[fol. 36]

Pabst Farm

Gross Receipts From Sales—1944:

Butter fat	\$754,370.23
Powdered skim milk	178,169.28
Sweetened condensed skim	29,191.86
Sweetened condensed—8 per cent	312.13
Superheated manufactured skim	57,182.22
Three to one manufactured skim	46,171.82
Raw skim milk	46,108.94
Raw milk sold	2,463.13

 \$1,113,969.79

Employee (average for 1944):

Plant Operation	18
Office	2
	—
Total	20

[fol. 37]

EXHIBIT J
PABST FARM
 Rural Route, Oconomowoc, Wisconsin

No. of Units	*Machines	Rated Horse- power Output	Equiva- lent Kilowatt Input	Esti- mated Hours Daily Use	**Kilowatt-Hrs. Daily Consumption
Milk Receiving					
1	Milk can conveyor	2	1.7	6	10.2
1	Milk sampler	$\frac{1}{8}$	0.1	5	0.5
4	Motors on milk can washer	10 $\frac{1}{2}$	9.0	4	3.6
1	Air compressor—on dump scales	$\frac{1}{4}$	0.2	6	1.2
Cream Separation					
3	Cream separators	9	7.7	4.5	34.7
1	Small separator	$\frac{1}{8}$	0.1	2	0.2
1	Holding tank agitator	1	0.9	6	5.4
1	Milk pump to separator	5	4.3	5	21.5
1	Separator disc washer	$\frac{1}{2}$	0.4	1	0.4
1	Cream pump	$\frac{1}{2}$	0.4	5	2.0
1	Skim milk pump	2	1.7	6	10.2
Pasteurizing (Exclusive of cooling and unassigned plant operation)					
2	Pasteurizing vat—agitator	1	0.9	3	2.7
1	Pasteurizing vat—hot water pump	$\frac{1}{2}$	0.4	3	1.2
1	Holding tank agitator	1	0.9	1	0.9
1	Pipe washer	$\frac{1}{2}$	0.4	1	0.4
Powdered Skim Milk Manufacture					
3	Skim milk tanks—agitators	5	4.3	1	4.3
1	Skim milk dryer	15	12.9	6	77.4
1	Skim milk preheater pump	$\frac{1}{2}$	0.4	6	2.4
2	Skim milk pumps	1	0.9	6	5.4
1	Skim milk flaker	3	2.6	6	15.6
1	Skim milk powdering mill	3	2.6	6	15.6
1	Condensate pump for dryer	2	1.7	6	10.2
Skim Milk Condensery					
1	Preheater milk pump	2	1.7	10	17.0
1	Milk pump—condensed milk pump to canner	1	0.9	3	2.7
1	Milk pump—extra unit	2	1.7	1	1.7
1	Condensed skim milk cooling vat	1	0.9	8	7.2
1	Condensate pump	1 $\frac{1}{2}$	1.3	10	13.0
1	Pipe washer	$\frac{1}{2}$	0.4	2	0.8
Cooling for Pasteurizing, Skim Milk Processing, and Holding					
1	Ice machine	20	17.2	20	344.0
1	Refrigerator unit	2	1.7	24	40.8
1	Agitator for water cooling tank	2	1.7	24	40.8
1	Cold water pump—skim milk con- densery	3	2.6	8	20.8

* Both parties reserve the right to show that the categories in which the devices or motors are placed above do not properly reflect their functions.

** The Kilowatt-Hours Daily Consumption represents the Rated Horsepower Output of each motor times the estimated Hours of Daily Use and does not necessarily represent actual kilowatt hour consumption.

[fol. 38]

EXHIBIT J (Continued)

PARST FARM
Rural Route, Oconomowoc, Wisconsin

No. of Units	Machines	Rated Horse- power Output	Equivalent Kilowatt Input	Estimated Hours Daily Use	**Kilowatt-Hrs. Daily Consumption	
1	Cold water pump — skim milk cooling.....	5	4.3	6	25.8	
1	Cold water pump—cream pasteurizer and cooler.....	2	1.7	5	8.5	
1	Circulating fan in refrigerator.....	$\frac{1}{8}$	0.3	23	6.9	
1	Milk cooler in test barn.....	$\frac{3}{4}$	0.7	12	8.4	496.0
Laboratory						
1	Babcock tester.....	1/15	0.1	1.5	0.2	
1	Testing equipment motor.....	$\frac{1}{8}$	0.1	3	0.3	
2	Hot plates for testing.....		1.5	6	9.0	9.5
Boiler Room						
3	Stokers.....	13	11.2	6	67.2	
1	Draft fan.....	$7\frac{1}{2}$	6.5	10	65.0	
	Boiler meters.....	$\frac{1}{8}$	0.1	24	2.4	
1	Coal hoist.....	1	0.9	1	0.9	
1	Condensate return pump.....	$1\frac{1}{2}$	1.3	8	10.4	
1	Condensate return pump (spare unit).....	3		—		145.9
Water Supply						
1	Main well pump.....	20	17.2	6	103.2	
1	Booster pump.....	$7\frac{1}{2}$	6.5	18	117.0	
1	Small well pump.....	6	5.2	20	104.0	324.2
Miscellaneous						
1	Freight elevator.....	3	2.6	1	2.6	
1	Sump pump.....	2	1.7	7	11.9	
	Miscellaneous shop tools.....	2	1.7	25	0.4	14.9
Heating and Ventilating						
	Unit fans.....	1	0.9	4	3.6	
	Exhaust fans.....	$1\frac{1}{8}$	1.0	2	2.0	5.6
Barn Equipment						
1	Milking machine.....	$1\frac{1}{2}$	0.4	3	1.2	
1	Seed corn and hay drying machine (Used short time seasonally).....	10	8.6	1 Aug.	8.6	9.8
Lighting						
	Dairy building lighting.....		15	6	90.0	
	Barns lighting.....		10	4	40.0	
	Office and miscellaneous lighting.....		5	6	30.0	160.0
Total.....						1434.3

Note: Based on operations in August, 1946.

* Both parties reserve the right to show that the categories in which the devices or motors are placed above do not properly reflect their functions.

** The Kilowatt-Hours Daily Consumption represents the Rated Horsepower Output of each motor times the estimated Hours of Daily Use and does not necessarily represent actual kilowatt hour consumption.

[fol. 39]

EXHIBIT K

Rolland J. Ruby
Rural Route
Waukesha, Wisconsin.

Scope of Business

This dairy is engaged in the business of producing and purchasing, pasteurizing, bottling, keeping refrigerated, selling and delivering milk and cream and in operating the farm on which the dairy is located. Approximately 80 per cent of the milk received at the dairy is produced on this farm. Some chocolate drink and orange drink is prepared from concentrates, and some butter, eggs, cottage cheese and buttermilk are purchased for resale. Ninety-five per cent of the milk sold is pasteurized milk and five per cent is sold as raw milk. Delivery is made by three trucks owned by the customer.

Daily Receipts of Milk: 3,000 pounds of milk.

Gross Receipts Per Year:

Total receipts of dairy and farm	\$51,500
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Receipts from sales of dairy	
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Milk and cream	\$33,000
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All other products	11,000
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Total Dairy Receipts	\$44,000
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Employees (Dairy):

Plant Operation	2
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Distribution	3
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Total	5
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[fol. 40]

EXHIBIT K
ROLLAND J. RUBY
 Rural Route, Waukesha, Wisconsin

No. of Units	*Machines	Rated Horse- power Output	Equiva- lent Kilowatt Input	Esti- mated Hours Daily Use	**Kilowatt-Hrs. Daily Consumption
1	Cream Separation				
	Cream Separator.....	$\frac{1}{8}$	0.3	5	0.2
1	Pasteurization (Excl. of cooling and unassigned plant operations)				
	Pasteurizing vat—agitator.....	$\frac{1}{4}$	0.2	3	0.6
1	Milk pump—through cooling coils.....	$\frac{1}{4}$	0.2	1.5	0.3
	Cooling for Pasteurization, Ageing and Holding				
1	Ice machine.....	2	1.7	6	10.2
1	Circulating fan in refrigerator.....	$\frac{1}{8}$	0.1	8	0.8
	Bottle Washing and Bottling				
1	Bottle washer.....	2	1.7	2	3.4
1	Bottle filler.....	$\frac{1}{4}$	0.2	1.5	0.3
	Boiler Room (Steam or hot water for pasteurization, bottle washing and plant heating)				
1	Oil burner.....	$\frac{1}{8}$	0.1	5	0.5
1	Boiler water pump.....	$\frac{1}{6}$	0.2	1	0.2
	Water Supply				
1	Well pump for dairy plant.....	$\frac{3}{4}$	0.7	3	2.1
1	Well pump for dairy plant, barns and house.....	1	0.9	6	5.4
	Milk Supply				
1	Milking machine.....	$\frac{1}{2}$	0.4	2	0.8
	Lighting				
	Dairy plant lighting.....		0.9	2	1.8
	Cow barn lighting.....		.5	5	0.3
	House barn lighting.....		.2	25	0.1
	House				
	General household use.....				3.0
	Total.....				30.0

Note: Based on operations in August, 1946.

* Both parties reserve the right to show that the categories in which the devices or motors are placed above do not properly reflect their functions.
 * The Kilowatt-Hours Daily Consumption represents the Rated Horsepower Output of each motor times the estimated Hours of Daily Use and does not necessarily represent actual kilowatt hour consumption.

[fol. 41]

EXHIBIT L

Borden Milk and Ice Cream Company
1010 Thirteenth Street
Racine, Wisconsin

Scope of Business

This dairy is engaged in the business of purchasing, pasteurizing and bottling, and keeping refrigerated, selling and delivering milk and cream. Some milk is homogenized. The customer also manufactures cottage cheese and butter-milk; chocolate milk and orange drink from concentrates which it purchases. Some butter and eggs are purchased for resale, and ice cream, which is manufactured in Milwaukee, is delivered to local customers from this plant. The milk received at this plant is purchased from farmers at the plant. Delivery of the output of this plant is made by twenty-four customer-owned trucks and four trucks are used in the delivery of ice cream. Forty per cent of the output of this plant represents wholesale sales.

This customer pasteurizes milk by a different process than any of the other dairies inspected, utilizing the so-called flash system. In this system of pasteurization, the milk is heated to a temperature of 161 degrees and held at that temperature for 16 seconds, after which it is immediately cooled to approximate 32 degrees. The heating and cooling of the milk takes place in a radiator which makes use of the regenerative process by which the heat of the outgoing milk is used to partially warm the incoming milk. In addition to the regenerative coils, the radiator contains steam coils which are used to heat the incoming milk, and other coils containing cold brine are used to cool the outgoing milk.

Daily receipts of Milk: 25,400 lbs. of milk.

Daily Yield of Plant:

Pasteurized Milk—72 per cent.

Pasteurized Cream—20 per cent.

Cottage cheese	}	8 per cent.
Chocolate milk		
Orange drink		
Butter		
Eggs		

[fol. 42] Gross Receipts Per Year:

Pasteurized Milk and Cream and all other products listed above	\$633,500
Ice Cream Sales (Brought from Milwaukee)	426,500
Total	\$1,060,000

Employees:

Office	6
Plant Operation	23
Distribution	36
Total	65

[fol.

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EXHIBIT L

BORDEN MILK & ICE CREAM CO.

1010 13th Street
Racine, Wisconsin

*Machines	Rated Horse-power Output	Equivalent Kilowatt Input	Estimated Hours Daily Use	**Kilowatt-Hrs. Daily Consumption	
Milk Receiving					
Milk can washer	2	1.7	2	3.4	
Milk can dryer	1	.9	2	1.8	
Milk can conveyor	1½	1.3	2	2.6	
Milk pump—receiving tank to holding tanks	1½	1.3	3	3.9	11.7
Cream Separation					
Cream separator	2	1.7	3		5.1
Pasteurization (Excl. of cooling and unassigned plant operations)					
Hot water pump for pasteurizer	3	2.6	4	10.4	
Brine pump for pasteurizer	2	1.7	4	6.8	
Milk pump—holding tank to pasteurizer	½	0.4	4	1.6	
Holding tank agitators	¾	0.7	5	3.5	
Milk pump—through pasteurizer	1	0.9	4	3.6	25.9
Cooling for Pasteurization, Ageing and Holding					
Ice machine	30	25.8	10	258.0	
Brine pump	5	4.3	8	34.4	
Brine pump—(auxiliary unit)	5				
Refrigeration units to cool delivery trucks at night	8	6.9	2	13.8	306.2
Milk Homogenizing					
Homogenizer	7½	6.5	1.5		9.8
Buttermilk, Cottage Cheese and Chocolate Milk Manufacture					
Vat agitators	3	2.6	2	5.2	
Milk pump—from vats to holding tanks	⅓	0.3	5	0.2	
Holding tank agitator	⅓	0.3	4	1.2	
Holding tank agitator	¼	0.2	2	0.4	
Cottage cheese culture tank	1/5	0.2	6	1.2	8.2
Ice Cream Handling					
Conveyor for receiving and loading ice cream	2	1.7	2	3.4	
Ice saw	¼	0.2	5	0.1	3.5

Both parties reserve the right to show that the categories in which the devices or
 rs are placed above do not properly reflect their functions.
 The Kilowatt-Hours Daily Consumption represents the Rated Horsepower Output of
 motor times the estimated Hours of Daily Use and does not necessarily represent
 1 kilowatt hour consumption.

[fol. 44]

EXHIBIT L (Continued)*

BORDEN MILK & ICE CREAM CO.

1010 13th Street

Racine, Wisconsin

No. of Units	*Machines	Rated Horse- power Output	Equivalent Kilowatt Input	Estimated Hours Daily Use	**Kilowatt-Hrs. Daily Consumption
Bottle Washing, Bottling and Handling					
2	Motors on bottle washer.....	8	6.9	6.5	44.9
1	Conveyor for bottle washer.....	1	0.9	2.5	2.3
1	Bottle washer solution pump.....	2	1.7	.25	0.4
1	Bottle filler.....	1½	1.3	7	9.1
1	Conveyors to refrigerator.....	2	1.7	7.5	12.8
Boiler Room					
1	Air compressor—for control in- struments.....	½	0.4	8	3.2
1	Air compressor—(auxiliary unit).....	7½			
Freight Elevator					
1	Elevator motor.....	15	12.9	1	12.9
Garage					
	Machine shop equipment.....	2	1.7	.25	0.4
1	Air compressor—for tires and cleaning.....	2	1.7	2	3.4
Ventilating and Heating					
1	Vacuum pump.....	2	1.7	1.5	2.6
3	Unit fans.....	2½	2.2	8	17.6
Lighting					
	Entire plant lighting.....		15	9	135.0
	Total.....				615.0

Note: Based on operations in August, 1946.

* Both parties reserve the right to show that the categories in which the devices or motors are placed above do not properly reflect their functions.

** The Kilowatt-Hours Daily Consumption represents the Rated Horsepower Output of each motor times the estimated Hours of Daily Use and does not necessarily represent actual kilowatt hour consumption.

[fol. 45]

EXHIBIT M

South Side Dairy
2519 Jerome Boulevard
Racine, Wisconsin

Scope of Business

This dairy is engaged in the business of purchasing, pasteurizing, bottling, and keeping refrigerated, selling and delivering, milk and cream. The customer also prepares from concentrates which it purchases chocolate milk, orange drink and grape drink. Butter, cottage cheese and buttermilk are purchased for resale, the butter being packaged at the plant. The milk is purchased from producers at the plant. Delivery of the finished products is made in four dairy-owned trucks. The cooling system utilized by this customer is a mixture of two types. The ice machine which provides coolant for the milk cooling coils, operates a direct expansion cooling system, and the ice machine which is used to cool the refrigerator, operates a brine system, which requires considerably more running time for the motor than the direct expansion system.

Daily Receipts of Milk: 3,000 pounds.

Gross Receipts for Year:

Pasteurized Milk and Cream	\$55,000
Chocolate Milk)	
Orange Drink)	2,300
Grape Drink)	
Butter)	
Cottage Cheese)	20,700
Buttermilk)	
Total	\$78,000

Employees:

Office and Plant Operation	2
Distribution	4
Extra	1
Total	7

[fol. 46]

EXHIBIT M
SOUTH SIDE DAIRY
 2519 Jerome Blvd.
 Racine, Wisconsin

No. of Units	*Machines	Rated Horse- power Output	Equiva- lent Kilowatt Input	Esti- mated Hours Daily Use	**Kilowatt-Hrs. Daily Consumption
	Milk Receiving				
1	Milk pump—receiying tank to pas- teurizing vats.....	1/2	0.4	5	0.2
	Cream Separation				
1	Cream separator.....	1/4	0.2	1	0.2
	Pasteurization (Exclusive of cooling and unassigned plant operations)				
1	Pasteurizing vat—agitator.....	1/4	0.2	1	0.2
1	Hot water pump for pasteurizing vat.....	1/2	0.4	1	0.4
1	Milk pump—through cooling coils.....	1/2	0.4	1.5	0.6
	Cooling for Pasteurization, Ageing and Holding				
1	Ice machine—milk cooling coils...	4	3.4	1.5	5.1
1	Ice machine—refrigerator.....	3	2.6	8	20.8
	Bottle Washing and Bottling				
1	Bottle washer.....	3/4	0.7	2	1.4
1	Bottle filler.....	1/2	0.4	1.5	0.6
	Heating and Ventilating				
2	Unit fans.....	1/2	0.4	5	2.0
	Lighting				
	Entire plant lighting.....		0.3	3	0.9
	Total.....				32.4

Note: Based on operations in August, 1946.

* Both parties reserve the right to show that the categories in which the devices or motors are placed above do not properly reflect their functions.

** The Kilowatt-Hours Daily Consumption represents the Rated Horsepower Output of each motor times the estimated Hours of Daily Use and does not necessarily represent actual kilowatt hour consumption.

[fol. 47]

EXHIBIT N

Westfield Dairy
1609 Yout Street
Racine, Wisconsin

Scope of Business:

This dairy is engaged in the business of purchasing, pasteurizing, bottling, keeping refrigerated, and selling and delivering milk and cream. The customers also prepares buttermilk, cottage cheese, and occasionally a small amount of butter. It mixes from concentrates chocolate milk. Orange drink and butter are purchased for resale. Milk received at this plant is purchased at the plant. Distribution of the output of this plant is made by four trucks owned by the dairy.

Daily receipts of Milk: 3,700 lbs. of milk.

Gross Receipts Per Year: Milk and Cream	\$67,500
Buttermilk)	
Cottage cheese)	
Chocolate milk)	0,000
Orange drink)	
Butter)	13,500
Total	<u>\$90,000</u>

Employees: Office	1
Plant Operation	2
Distribution	5
Total	<u>8</u>

[fol. 48]

WESTFIELD DAIRY
1609 Yout Street
Racine, Wisconsin

No. of Units	*Machines	Rated Horse- power Output	Equiva- lent Kilowatt Input	Esti- mated Hours Daily Use	**Kilowatt-Hrs. Daily Consumption
Milk Receiving					
1	Milk pump—receiving tank to pas- teurizing vat.....	1/4	0.2	2	0.4
Cream Separation					
1	Cream separator.....	1/2	0.4	1	0.4
1	Testing machine.....	1/8	0.1	5	0.1
Pasteurization (Exclusive of cooling and unassigned plant operations)					
2	Pasteurizing vat agitators.....	1/2	0.4	5.5	2.2
1	Milk pump—through cooling coils.....	1/4	0.2	5	1.0
1	Brine pump—through cooling coils.....	1/4	0.2	5	1.0
Cooling for Pasteurization, Ageing and Holding					
1	Ice machine.....	2	1.7	12	20.4
2	Circulating fans in refrigerator....	1/4	0.2	12	2.4
Butter Manufacture					
1	Butter churn (seldom used).....	1/2		—	
Bottle Washing and Bottling					
1	Bottle washer.....	3	2.6	3.5	9.1
1	Bottle filler.....	1/4	0.2	4	0.8
Boiler Room (Steam or hot water for pasteurization, bottle washing and plant heating)					
1	Boiler water pump.....	1/4	0.2	2	0.4
Lighting					
	Entire plant lighting.....		1	6	6.0
	Total				44.2

Note: Based on operations in August, 1946.

* Both parties reserve the right to show that the categories in which the devices or motors are placed above do not properly reflect their functions.

** The Kilowatt-Hours Daily Consumption represents the Rated Horsepower Output of each motor times the estimated Hours of Daily Use and does not necessarily represent actual kilowatt hour consumption.

[fol. 49] IN THE DISTRICT COURT OF THE UNITED STATES

(Caption—1680)

Transcript of Proceedings of Trial—Filed October 1, 1946

Be It Remembered that heretofore, to-wit, commencing on Wednesday, September 25, 1946, at nine-thirty o'clock A. M. of said day, the above entitled matter came on for hearing before the Honorable F. Ryan Duffy, Judge of said Court, upon the pleadings heretofore filed herein:

APPEARANCES:

Shaw, Muskat & Paulsen, by Van B. Wake, Esq., on behalf of the plaintiff;

T. T. Cronin, United States Attorney; E. J. Koelzer, Assistant United States Attorney; Philip R. Miller, Special Assistant to Attorney General; and W. B. Waldo, Special Assistant to Attorney General, on behalf of the defendant.

(Thereupon the following proceedings were had and testimony taken:)

OPENING STATEMENT ON BEHALF OF PLAINTIFF

Mr. Wake: May it please your honor, perhaps a short opening statement might be in order as to the issues.

The Court: I think so. We did have a pre-trial conference. The matter is not too clear in my mind except that I believe it involves a sale of electrical energy to dairies and whether it is industrial or commercial or something of that sort.

Mr. Wake: I think your honor has a very good conception of where the parties are at issue. We pick up from that point. The law imposes a tax on domestic and commercial—

The Court: In other words, commercial isn't everything that pertains to business but there is a distinction between what might be classed as commercial and then what may be classed as industrial.

Mr. Wake: I believe so. I believe that is implicit in the historical development of the statute, and the regulations seem to recognize that there is that segregation so far as business activity is concerned.

The Court: What kind of work were the dairies doing that would make them industrial and not as a general commercial? In other words, tell me about that.

Mr. Wake: The dairies are all engaged in pasteurization, at least to some extent. We claim that the major extent of their activity revolves around the pasteurization as a process.

The Court: I suppose dairies do a lot of things. Would you have to show that pasteurization, assuming for a moment that it is an industrial activity, that that was the predominant use of the electrical energy?

Mr. Wake: Well, under one of the regulations the predominant use of the energy at the location does have some significance. The plaintiff's proof will show generally, or attempt to show, the nature of pasteurization and its relationship to the other portions of the plant, both from a functional as well as from an equipment standpoint. The evidence will be in large part supplied through a stipulation as to the general facts. Counsel have participated in endeavoring to ascertain requisite information as to the scope of activity of all of the 28 dairies. In respect of getting that detailed information, however, it was thought that some of them might be characteristic of others, so that from that point of view a few dairies were selected, typified among themselves, and certain others, either by reason of the amount of intake of the raw milk or characteristic which seemed to recommend them as being closely akin in respect of the volume or the type of their operation.

Concerning those which were selected apart from the 17—there are 17 which find themselves grouped characteristically among the balance—but selecting the ones which are thought to be quite characteristic of their class, then more intensive investigation by both the representative of the Treasury Department and the plaintiff went—their joint investigation went into the facts of the situation, and it was after that cooperation that the parties felt, through counsel, that they were able to arrange a stipulation showing generally the factual information.

Now, I should state that the stipulation permits of the introduction of evidence not inconsistent with the terms [fol. 51] of the stipulation itself, and as I told counsel at the outset, we do not challenge nor will not in any respect, of course, attempt to challenge any of the facts to which we

stipulate as to accuracy, but we do reserve the right at an appropriate time to raise questions as to their relevancy or materiality, bearing upon the issue of law.

The plaintiff believes itself to be, in part, under the broad theory of the case of Colorado Public Service Company against the United States. That case upon appeal by the government is reported in 143 Fed. 2d 79, in the Tenth Circuit.

The Court: You say there was an appeal from that? That was the appeal from the District Court? It didn't get to the Supreme Court?

Mr. Wake: No, sir. The parties stand at issue because the commissioner has refused to acquiesce in that decision. Presumably here—and this may be anticipating, in part—

The Court: If they don't agree with that they would like to get some other Court of Appeals to come to a contrary conclusion and get to the Supreme Court?

Mr. Wake: Or, conceivably, the government conceives the facts have been developed more in detail in this case which they claim, I understand, may have a relevancy and may afford some distinguishing characteristics between the adjudicated case and the one here at issue.

OPENING STATEMENT ON BEHALF OF DEFENDANT

The Court: Very well. Does the government desire to make a statement at this time?

Mr. Waldo: If your honor please, I represented the government at the pre-trial. In the meantime, so much work has been done by Mr. Philip Miller that we are going to let him make the opening statement and produce the evidence.

The Court: All right: Is it correct that you do not acquiesce in so far as it is applicable to this case to the decision of the Public Service Company of Colorado case 143 Fed. 2d 79?

Mr. Miller: That is correct, your honor, but in addition to that we believe that there is a distinction between some of the facts in that case and also in so far as the record which we hope to show in this case.

The Court: You may make your statement.

Mr. Miller: The tax was imposed by the statute which [fol. 52] was originally enacted in its present form in 1934,

and it says there shall be imposed upon electrical energy sold for domestic or commercial consumption the tax which is presently equivalent to $3\frac{1}{3}$ per cent.

The Court: Is this going to be another one of those cases that this court will have to pass on what Congress meant when they passed certain legislation that he voted either for or against? Is there any statute?

Mr. Miller: Well, I believe it goes as to both. There is a question of an interpretation of the statute. There is a portion of the regulation which I think is necessarily involved in this case, and it reads as follows, a short paragraph:

"Where electrical energy is sold to a consumer for two or more purposes through separate meters the specific use for which the energy is sold through each meter, that is to say whether for domestic or commercial consumption or for other use, shall determine its taxable status. Where the consumer has all the electrical energy consumed at a given location furnished through one meter the predominant character of the business carried on at such location shall determine the classification of consumption for purposes of this tax."

Now, the government takes the position that milk dealers, that is, individuals who are engaged in the purchase and sale and incidentally storing and packaging of fluid milk, are people who are engaged in a commercial business. The regulation and the statute, we believe, necessarily makes important the determination of the nature of the business rather than the individual consumption where there is not a separate metering for industrial purposes or for commercial purposes. That is, it is conceivable that in some cases, for example, a manufacturer may have a retail outlet and the meter is separately—or the electric company supplies him with a separate meter for each, then, perhaps, it would be possible to say, and the regulation so says that you can determine the specific use under each. However, where the electric company has not installed separate meters, the question becomes what is the predominant character of the business carried on at that location.

The Court: What is the situation here? Is this all through one meter, where we have to determine what is predominant, or is there more than one meter?

Mr. Miller: There has been a bill of particulars furnished

[fol. 53] in this case, which shows that in some cases the electrical energy is furnished.

The Clerk: There is no bill of particulars in the file. Do you have a stipulation of facts?

Mr. Miller: Yes.

The Clerk: That hasn't been filed either.

The Court: Here it is right here. The bill of particulars is in the file.

Mr. Miller: Yes, sir, there is a subject in the stipulation which I think will clarify the question which your honor has raised.

The Court: Well, I notice in Exhibit "A" here it says number of electric service meters; some have two, two of them, I think have three, and the rest have one.

Mr. Miller: That is right, your honor. Now, there is a statement in the stipulation concerning the separate metering or single metering in this case, and that is in Paragraph 2. I can either pass this up or read it to your honor.

The Court: You can read it to me.

Mr. Miller: All right. The portion is in Paragraph 2, which says: "The names of the dairies and the addresses from which their operations are directed are as disclosed in the bill of particulars which has been filed herein, and essentially duplicated as Exhibit 'A' hereto, which also shows the number of electric service meters through which the electrical energy supplied is measured to the respective customers. Where one meter is shown, all energy consumed at the location indicated, whether for light or for power, is measured through that meter. Where two or more meters are used, the customer in some cases takes part of its energy under a refrigeration service rate which is lower than regular commercial or power service rates but which refrigeration service rate allows only use of refrigeration equipment plus 25 per cent thereof other incidental equipment other than lights. In other cases two or more meters may be necessary because the customer has both single-phase and three-phase power equipment. The separate power meters are not so connected to the load as to enable the energy supplied for one purpose or another in the operation of the dairy plant to be differentiated."

In other words, your honor, even in the cases where there are more than one meter they are not metered for the specific purpose of differentiating between the domes-

tic and commercial, on the one hand, and industrial consumption, on the other. So, the government takes the position that in each one of these cases we are in the same position as having to determine the situation with respect to a business where there is only one meter.

Now, we take the view in this case that when the language "sale for domestic or commercial consumption" is used that it is impossible to tell just from the particular operation what is commercial consumption; that is, processes of all kinds are carried out in commercial business, for example, custom tailoring, restaurants and other types of businesses which are obviously commercial in nature, and whatever is done in that business must be determined by the entire nature of the business rather than the particular activity.

The Court: Did the Public Service Company of Colorado case determine that pasteurization was industrial use?

Mr. Miller: I believe the Public Service Company of Colorado case interpreted the language—or found in that case that pasteurization was an industrial use, in response to the argument, or it merely found with respect to the business that as any other manufacturing business was engaged in manufacturing to the extent that pasteurization resembled it, that it also sold the product and did not find anything as to the nature of the business, that is, as to whether or not milk dealers—or, as a matter of fact, it doesn't use that term, but it said that dairies were not engaged in this commercial business and the use of the electricity was not for commercial use.

Now, in this case the government has distinguished between businesses which are dealing in fluid milk, that is, purchasing and selling and distributing fluid milk, and businesses which are engaged in the business of manufacturing butter, manufacturing cheese, and manufacturing ice cream.

Now, in any instance where the predominant nature of the business as disclosed by its gross receipts is such that it may be considered predominantly a manufacturer of ice cream, cheese or butter, the government would take the position that that may be an industrial use. On the other hand, where the predominant nature of the business [fol. 55] is purely dealing in fluid milk, the incidental processing in connection with that does not change the character of the business.

Now, in each one of these cases, with the possible exception of one, the Pabst Farm, each of these businesses is a dairy that engages in the purchasing of milk; it delivers the milk to individual consumers on regular routes and maintains a fleet of trucks and wagons and similar types of delivery equipment, and we believe that the nature of the business in each one of these cases, with the possible exception of Pabst Farm, which is engaged—

The Court: Does Pabst raise just its own milk?

Mr. Miller: Pabst Farm raises its own milk and, in addition to that, it makes skim milk and powdered milk, and I believe ice cream mix and butter fat and similar types of things which are sold in the Chicago area rather than distributed to individual customers or customers on regular routes as is done in the case of some of the others. Some of the dairies in this case are adjuncts to farms; that is, milk is actually produced on the farm and is pasteurized and delivered. To some extent in one of the cases raw milk is delivered and it is not pasteurized. But in each one of these cases the predominant business, measured by gross receipts, activities generally, personnel engaged, is mainly delivering the milk and the receiving of it.

The Court: You may proceed, Mr. Wake.

PLAINTIFF'S EVIDENCE

Mr. Wake: All right. Is the stipulation offered?

Mr. Miller: Yes.

Mr. Wake: For the record—

The Court: A stipulation of facts has now been presented—I assume signed by counsel for each side—which will be received in evidence and will be considered as evidence in the case.

Mr. Wake: We should like for the purposes of the record, your honor, and consistent with my opening statement as to the stipulation, to object to the materiality and relevancy of certain facts which I will now point out.

The Court: Very well.

Mr. Wake: But one objection, of course, does not go to the accuracy or the type of evidence in the manner of presenting it.

On page 3, under Paragraph 5, about the fifth sentence, it starts as follows: "The consumers to whom the prod-

[fol. 56] icts are delivered are regular customers," et cetera throughout the balance of the paragraph. The plaintiff objects on the sole ground that while the evidence is unquestionably true, the plaintiff contends that that matter or the matters therein detailed are not competent, relevant nor material to the issue of law in the case.

Similarly, page 6 of the stipulation, where the reference is next preceding enumerated Paragraph 10: "Total Personnel and Duties Assigned". That is a reference to a description of a type of information that appears on practically all of the detailed exhibits. The plaintiff objects to the information of that character upon the same ground as assigned in the previous objection.

As to the method and manner of detailing all of the rated horse power output, the equivalent kilowatt input, estimated hours daily use—

The Court: What are you talking about now?

Mr. Wake: I am giving some general descriptions—kilowatt hours daily consumption, which is a schedule attached to each dairy study, the plaintiff conceding the approximate accuracy of those figures so far as they originate in estimates does not concede that that is an appropriate form or classification of setting forth the material so far as the issue of law is concerned.

The Court: Well, at this time the objection will be overruled but without prejudice to a later ruling when it comes to that point after the evidence is all in. I can't tell at this time.

Mr. Wake: I should like to call Mr. Fisher to the witness stand.

ROBERT FISHER, called as a witness herein, on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wake:

Q. And your name is?

A. Robert Fisher.

Q. Mr. Fisher, you are a graduate engineer residing in Milwaukee County?

A. I am.

Q. And you hold an engineering degree in what particular branch of the science?

[fol. 57] A. Electrical engineering.

Q. You are associated with the plaintiff here?

A. Yes.

Q. And as part of your duties is it the fact that you and a field man from the Treasury Department jointly made certain field inspections and obtained field data from some of the dairies covered in the stipulation?

A. Yes.

Q. And so far as the personal knowledge that you acquired—you saw approximately how many dairies?

A. We visited eleven dairies for inspection.

Q. And did you attempt to familiarize yourself with the functional aspects of pasteurization as a process?

A. Yes.

Q. And did you, after viewing some of these dairies; also attempt to delve into the literature generally just to bring yourself into theoretical appraisal of pasteurization as a pursuit?

A. Yes, I did.

Q. I show you Plaintiff's Exhibit 1, and ask you if you will identify it for the record merely by telling us its general nature?

A. This is a schematic diagram showing the layout of a dairy plant and illustrating the various equipment in the plant.

Q. Now, I am going to pass the original to the court and ask you to follow the copy. Now, so that there will be no misunderstanding, what is the fact as to whether this drawing purports to be a development of any one dairy under consideration?

A. It was not intended to be an exact picture of any particular dairy.

Q. What is the fact as to whether the drawing purports to be a characterization of pasteurizing as a pursuit?

A. It illustrates the various equipment that a dairy uses in pasteurizing milk and related products. It includes all the main equipment that is used in performing operations upon the milk as it passes through the plant.

Q. You have used various symbols to denote items of machinery or items of equipment thereon?

A. Yes.

Q. Does the proportion of the size of any of those

symbols purport to in any respect be characteristic of that particular item of machinery or equipment, or is that [fol. 58] merely put in there is relative size to facilitate its interpretation?

A. No, there is no element of proportion intended here. They were merely shown in a convenient manner on the paper.

Q. And so far as you recall from your going over the exhibit there are no failures to mark any part of the equipment?

A. No, I don't believe so.

Q. For an interpretation of the drawing generally, milk comes in at the unloading platform, which you have diagramed at the center left of the picture, and after weighing and receiving finds itself into a holding tank; is that right?

A. All of the milk may not go to the holding tank. Some may go directly to the pasteurizing vat. That is especially true of the smaller dairies. The holding tank will hold the milk if the pasteurizing vat cannot accommodate it immediately upon receipt.

Q. And what is the fact as to whether or not some dairies have more than one holding tank?

A. Oh, some dairies may have several items of each of these equipment items.

Q. Including pasteurization vats?

A. Yes. Tanks and pasteurization vats, milk-cooling coils, even bottle fillers—they may have several of them.

Q. And what is the fact as to whether some of the items of equipment, for example, pasteurization vats, are so capable of connection that they can be turned into the intake of the milk at a line or turned over to another line, depending upon when the pasteurization is completed in any vat, so that their use is continuous? Maybe my question is too cumbersome. Are there instances where by means of couplings on the intake of milk the pasteurization vat can be used for one intake pipe or it can be closed off and another pasteurization vat used in connection with that same line?

A. Yes, there are various piping arrangements and the milk can be pumped or run into any vat at will.

Q. Some of them constitute, in effect, batteries of vats, do they?

A. Yes, that is right.

Q. And your line which leads off from the top—or leads off from the main line just short of the first pasteurizing

vat, that proceeds up to a point denoted "Separator". [fol. 59] What is the significance of those lines proceeding out from that central point, "Separator"? /

A. Well, some milk may go—instead of going to the pasteurizing vat, may go through the separator. The skim milk goes one direction and the cream will go in another direction; generally to a pasteurizing vat.

Q. Now, it might appear from an interpretation of your drawing that skim milk as shown in the tank at the top portion of the drawing and the cottage cheese vat which is connected out of the skim milk tank and the butter-milk vat which originates from the skim milk tank are used in connection with a fluid which is not pasteurized. What is the fact?

A. No, there is an asterisk attached to the label "Skim Milk Tank" and a note explains that the skim milk is generally pasteurized, but to avoid complicating the diagram we didn't put that equipment in.

Q. Your symbol marked "Milk Cooling Coils"—will you explain the general indication intended there?

A. I attempted to show the manner in which the milk is cooled suddenly after coming from the pasteurizing vat at high temperature.

Q. The actual process might vary in some respects from dairy to dairy as to precise equipment in use?

A. Yes, there may be variations. Do you want me to explain that?

Q. Yes, if you please.

A. I attempted to show that the refrigerant coming from the refrigerating plant or ice machine flows through a system of coils and the milk runs down from pipes at the top of these coils—milk flows over these coils which contain the cold refrigerant, and by that method the milk is cooled and collected at the bottom at a low temperature.

Q. Refrigerant used in dairies also has another purpose. Will you outline briefly the other purpose?

A. If milk is put into holding tanks and held for any length of time they must be cooled to bring the temperature of the milk down to a point where the bacteria won't multiply so rapidly.

Q. Well, after the milk is bottled where does it pass to customarily?

A. As soon as it is bottled it goes to a refrigerator room.

Q: That room is maintained at desired temperatures by what method or manner?

A. Well, the refrigerant circulates in the refrigerating [fol. 60] room also through various equipment for the purpose of keeping that room cool.

Q. You have shown an homogenizer coming out of the centrally located agitator motor and pasteurizing vat, talking about location. Is it your understanding that an homogenizer is usually set after pasteurizing or are there instances where it is connected so its intake of milk is unpasteurized?

A. I believe generally connected so it homogenized the milk after the heating.

Q. Are there instances where homogenized milk is sold in an unpasteurized state, if you know?

A. Not that I know of.

Q. Now, the symbol denoting your boiler or your method of producing hot water and steam—you show one lead going to your bottle washer and another one denoted "Steam or Hot Water" proceeding to the pasteurizing vat. What significance does that line have to the pasteurizing vat?

A. Well, that is the means of heating that milk to the required temperature for pasteurizing and holding that temperature during the period that it is in that tank or vat.

Q. There are a few dairies, as shown by the stipulation, which have deep well pumps. In what manner would they be related, if at all, to the boiler?

A. To the boiler?

Q. Yes.

A. Well, they would provide the water that is used in the boiler, that is heated.

Q. That is as feed water, for one purpose?

A. Yes.

Q. The alternative would be city water?

A. That is right.

Q. And where a dairy has a deep well from your inspection is another use made of the water?

A. If the water is cold they can also use it for part of their refrigerating purposes.

Q. It would functionally be used and be related to your diagram short of the milk cooling coils or some integral portion of that step?

A. Yes. The cold water may circulate through part of the milk cooling coils.

Q. Now, those deep wells, where their water is used as a portion of the cooling, how is the water drawn from the wells; what device is used for that purpose?

[fol. 61] A. A deep well pump.

Q. And motivated by what?

A. By electric motor.

Q. Your ice machine which has been mentioned now, and is connected both to the refrigerated room and the milk cooling coils—that may be of different types of construction?

A. Yes, there are many types of ice machines.

Q. You call it "Brine Pump". Brine is a combination of ice and salt at some desired proportion, is it?

A. One type of brine is a combination of salt and water.

Q. And there are other types of refrigerants?

A. Yes; many types of refrigerants.

Mr. Wake: We offer Exhibit 1 in evidence for the purposes indicated.

The Court: Exhibit 1 will be received.

(Said document, marked "Plaintiff's Exhibit No. 1," so offered, was thereupon received in evidence.)

Mr. Wake: You may cross-examine.

Cross-examination.

By Mr. Miller:

Q. Mr. Fisher, this diagram does not purport to show the fleet of trucks and wagons and other equipment used by any dairy in delivery by any dairy, does it?

A. No.

Q. In the righthand corner I notice you have a space for the loading platform.

A. Yes.

Q. That doesn't purport to represent an element of proportion of loading in these various other activities—as compared to these activities that you have represented?

A. No, there is no element of proportion intended in this diagram.

Q. And that applies to the refrigeration room as well?

A. Yes.

Q. In some of the dairies that you visited, wasn't this refrigeration room that was used for storage considerably larger than what you have made it here?

A. If you are speaking of proportion as indicated on the diagram I would say yes, it is larger in proportion than is shown here.

Q. In some of these places the storage room for milk was almost as large as the rest of the plant, was it not?

[fol. 62] A. We didn't obtain any floor areas. I can't say.

Q. Well, did you observe?

A. It is generally a large room, yes.

Q. In this refrigeration room they put bottles of milk for the purpose of awaiting delivery, don't they?

A. They are put in there as soon as they are bottled until they are taken out.

Q. Now, when you have the items "Milk Pump" and "Hot Water Pump" in circles, that is, one circle within the other, those are intended to represent motors, aren't they?

A. It is just a symbol denoting the pump and its motor attached.

Q. Now, in many of the dairies which you visited there was no butter being made; isn't that right?

A. That is right; they did not all make butter.

Q. Many of them were not in the business of making butter?

A. That is right; some of them.

Q. And many of them were not in the business of making cottage cheese; isn't that true?

A. Well, not every dairy made everything I have indicated here.

Q. I see. Now, it is a fact, is it not, that most of the dairies did not homogenize milk; is it?

A. I wouldn't say most. Quite a few of them are doing that now.

Q. In the dairies you visited?

A. Yes.

Q. And even in those dairies which did homogenize milk only a part of the milk is homogenized, is it not?

A. Yes.

The Court:

Q. Do you understand an homogenizer to be a machine where the milk is forced through small screens to break down the fat globules?

A. That is my understanding of it.

Mr. Miller:

Q. Have you ever visited a milk plant that does not pasteurize milk, merely cools and bottles it?

A. Not recently. Not during this investigation.

Q. Well, have you at any time?

A. I don't recall of any trip.

[fol. 63] Q. The Ruby Farms does not pasteurize all its milk, does it?

A. I believe he said they pasteurized most of it.

Q. Most of it, but they do not pasteurize all of it?

A. That is my recollection.

Q. Do you have any knowledge as to whether in the Ruby Farms they used the milk cooling coils to cool the milk that came in that was not pasteurized?

A. Well, any milk going through the plant would have to be cooled.

Q. Whether or not it was pasteurized; isn't that right?

A. It would have to be maintained at a low temperature. It wouldn't have to be cooled to the extent that it is if it is heated for pasteurization.

Q. Well, milk comes into the plant or into these dairies usually warmer than the temperature at which it is maintained, does it not?

A. Yes, that is probably true.

Q. And it is cooled for the purpose of maintaining it?

A. Yes.

Q. Now, these milk cooling coils that you have in the picture in this very black portion—that, in part, is nothing but some water pipes over which milk runs, is it not?

A. A series of pipe that may contain cold water, brine or other refrigerant, and the milk flows down over the outside of them.

Q. In many cases it contains nothing but water, doesn't it?

A. No.

Q. Do you know where they obtain that water?

A. Well, they either get water from the city system or from a well.

Q. And in the winter much of that water is considerably colder than the milk, is it not?

A. Well, it is colder than the milk is when it comes from the pasteurizing vat, yes.

Q. And the ordinary lake water which is run through the city water system is adequate in many cases to cool the milk considerably, isn't it?

A. It cools it some.

The Court:

Q. Do you understand by pasteurizing that the heat is applied to the tank containing the milk and kept at a certain degree, say something around 145 degrees, for a certain period of time?

A. That is the heating part of the pasteurization.

Q. Then it is after that process that it goes across these cooling coils?

A. That is right.

Mr. Miller:

Q. As far as you know, Mr. Fisher, in many of these cases doesn't the plain lake water cool the milk to the temperature at which it was received merely by the application—or running the milk over the water in the pipes?

A. I can't tell you the exact temperature to which the water cools the milk.

Q. You don't know that it doesn't?

A. No, I don't know.

Q. Now, this represents, you said, a picture of an average dairy; is that your conception?

A. It is just a picture of what a dairy might be, of all the equipment that is in a dairy.

Q. I see. But you are not attempting to show by this that a layout of an average dairy includes butter churns and cottage cheese vats and buttermilk vats, do you, or homogenizer?

A. I am not contending that every dairy manufacturer has this.

The Court: Don't take the time on useless things that there is no dispute about it. He has gone over that very clearly.

Mr. Miller:

Q. In the case of a larger dairy, Mr. Fisher, isn't it true that mainly the difference between the items you do have in connection with whatever is done to fluid milk—that the devices which are used are mainly mostly multiplication of these? Isn't that true?

A. Yes.

Mr. Miller: That is all.

Redirect examination.

By Mr. Wake:

Q. One question, Mr. Fisher. I understood this question was asked of you, whether or not milk usually comes in warmer than it is desired to be maintained and I believe your answer was yes. What effect, if any, does the mean [fol. 65] temperature of this locality have in response to that question; what did you have in mind?

A. Well, the milk would come in at a lower temperature in the winter time around here than it would in the summer. In fact it may be at a temperature—at quite a low temperature, so that very little cooling is required in the winter time upon receipt.

Q. Do you know from your investigation whether or not upon occasion it actually has to be pre-warmed in handling, or isn't that the fact?

A. That may occur at times.

Q. You don't know what the recorded average mean temperature of this area in Milwaukee County is, do you?

A. It is approximately 46; somewhere around there.

Q. Fahrenheit?

A. Yes.

Mr. Wake: That is all.

Mr. Miller: One question, your honor.

The Court: All right.

Recross-examination.

By Mr. Miller:

Q. Isn't it a fact that in the winter time the lake water which flows through the pipes of the city of Milwaukee is lower than the temperature at which milk is to be kept—at which it is desired to keep it at?

A. No, I wouldn't say it is.

Q. In the winter time?

A. No.

Q. It is not lower than 40 degrees on occasion?

A. I don't believe it is.

Q. Is it in the vicinity of that temperature?

A. I understood it was something higher than that. I don't have the figures here.

Q. You don't know?

A. No.

Mr. Miller: That is all.

The Court: Next witness.

(Witness excused.)

Mr. Wake: I will call Professor Sommer.

[fol. 66] HUGO H. SOMMER, called as a witness herein, on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wake:

Q. Will you state your name, please?

A. Hugo H. Sommer, S-o-m-m-e-r.

Q. Dr. Sommer, your address, please?

A. Madison, Wisconsin.

Q. And your profession or pursuit of learning?

A. Professor of Dairy Industry at the University of Wisconsin.

Q. Will you kindly tell us what portion of your life you have devoted to the study of the dairy industry?

A. Well, in a sense I have been connected with the dairy industry to some degree since my boyhood days, born and reared on a dairy farm, worked in a cheese factory, took academic training which finally led to a position in the Department of Dairy Industry since 1920.

Q. And you have attempted, both intensively and extensively, study of the various ramifications of that industry, have you?

A. That is right.

Q. Have you attempted to keep yourself currently informed as to developments in the art?

A. Yes.

Q. You are the author of one or more textbooks or scientific treatises relating to market milk, are you?

A. I am the author of a text book relating to market milk under the title of "Market Milk and Related Products"; author of a text book on "The Theory and Practice of Ice Cream Making".

Q. The first mentioned treatise—what was its last publication date and the publication house, if you can give it?

A. The text book, "Market Milk and Related Products", was published originally in 1938 and a second edition in 1946; published by myself.

Q. Now, as a matter of information, you have been subpoenaed here by the government and also requested by the plaintiff, Wisconsin Electric Power Company, to appear?

A. That is substantially—

Q. Your services were jointly requisitioned in some manner?

[fol. 67] A. That is right.

Q. To what extent, Doctor, have you given consideration to the art of pasteurization, both as a theoretical process or theoretical art and one of distinct useful application?

A. Well, in treating the subject "Market Milk and Related Products", pasteurization is inevitably a very important part of that treatment and it is necessary to try to keep posted on all ramifications of that subject.

Q. Does the machinery—strike that.

(Question waived.)

Q. Do you have a conception of the relative magnitude of investment required for pasteurization machinery and equipment comparing it generally to the facilities which would otherwise be required for merely receiving milk and bottling it in sterilized bottles?

A. You are speaking just of equipment now as distinct from the plant investment?

Q. Well, yes, equipment first.

A. Well, I have no detailed figures on that, but you would need—I take it you are trying to contrast a raw milk operation—what that might be as against—

Q. That is right.

A. —an operation involving the pasteurization of milk.

Q. That is right.

A. You would need your receiving room operations, which involves conveyors, a weighing-scale, sampling devices, can washer, pumps, storage tank, filter. That equipment would be common to both operations. In pasteurization you would need the pasteurizing equipment, which would be omitted in raw milk operations. From that point on again you would have a similarity with this exception, that where you pasteurize the milk when you are through

with the heating phase of pasteurization you will have the temperature of the milk up to 143 to 145, or if you used the high temperature, short-time process, at 160 degrees Fahrenheit, so that the cooling capacity would have to be greater than where you are bottling raw milk, which in many seasons of the year comes in around 60 degrees Fahrenheit and so the cooling there would be more limited and you wouldn't use much capacity. In both cases you try to cool the milk down to about 38 or 40 degrees Fahrenheit for temporary storage in a cold room prior to your routine delivery. So, in the contrast I have tried to draw [fol. 68] there, it is obvious that the only difference in the investment in equipment for comparable operations as to capacity is concerned, would be in the pasteurizing equipment, such accessory equipment that goes with it, and somewhat greater cooling capacity. Now, I don't know proportionately what part that would be of that investment, but I would think, as a rough estimate, that might be about 15 or twenty per cent of the investment of the equipment.

Q. Now, as a matter of actual practice, what is the fact as to whether or not it is of any importance to quickly induce a lower temperature after pasteurization through the heating phase?

A. The desire for cooling promptly is attributed to the desire of limiting any adverse effects which prolonged heating would have on the milk. There are some who believe that sudden cooling may have some virtue in producing a lethal effect as far as the bacteria are concerned, but that is extremely questionable.

Q. It is still a theory somewhat entertained in respectable quarters, isn't it?

A. I didn't follow you.

Q. The theory you raised is entertained in some respectable quarters, isn't it, the possible lethal effect of sudden, induced lowering of the temperature after the heating phase of pasteurization?

A. I understand. I didn't catch your last word in that.

Q. In some quarters?

A. In some quarters. Yes, I believe that view is held by some.

Q. And as a matter of actual practice most of the dairies with which you are familiar do have a sudden lowering

of the temperature after the heating phase of pasteurization?

A. Yes, they try to do the cooling promptly and quickly.

Q. Now, the portion of the plant as distinguished from the equipment therein—what does your knowledge indicate the relative requirements in a plant are by virtue of the pasteurization equipment or process of pasteurization?

A. (No answer.)

Q. I presume I should round that out by saying either in square feet of floor space or some other conventional type of measurement.

A. Well, that type of contrast is difficult to draw because [fol. 69] pasteurizing plants are generally large plants, because they undertake to handle a much larger volume, a much larger capacity, and a raw milk plant is usually a plant of small capacity. In other words, if they grow to large output it just no longer is as feasible for them to distribute raw milk, and so we have very large pasteurizing plants but only small raw milk plants. If you visualize plants of the same capacity, hourly capacity or daily capacity, the additional floor space required by the pasteurizing and cooling equipment, in turn, would differ according to the type of equipment they use. Where floor space is limited, they choose equipment such as the hot-short pasteurizing equipment which gives you a large capacity and a very limited floor space.

Q. That method is not in general use in this area compared to the other method?

A. I believe it is in use to some extent. I have no survey to show the proportions. If you were using vat pasteurization, then you would need considerably more floor space.

Q. Doctor, from your knowledge of the industry in Wisconsin, are there any plants which you know of, of any magnitude, which are devoted to the intake in preliminary handling of raw milk and the placing it in sterilized containers for immediate sale without the pasteurization process?

A. To my knowledge there is no sizable plant of that type.

Q. So that, from your knowledge and conception of the industry, in Wisconsin at least, pasteurization is an integral part in the operation of every dairy plant of any consequence?

Mr. Miller: I object to that, your honor. I think that would be a conclusion called for.

The Court: Objection overruled. The Doctor may answer.

A. I would say that pasteurization is a typical part of the operation.

Mr. Wake:

Q. Doctor, the production of butter and the related production of by-products, or those that might possibly be termed "by-products", skim milk and buttermilk—in what manner, if any, are they related to pasteurization?

A. They are related to pasteurization in that to produce a well-controlled product, a product with good keeping quality, it is necessary to employ pasteurization.

The Court:

Q. It is necessary to employ what?

A. It is necessary to employ pasteurization. In butter making it would result—omitting pasteurization in the case of butter making would result in a butter which would become rancid very rapidly.

Q. Do they pasteurize skim milk?

A. Skim milk must be pasteurized if it were to be returned to the farms for use as live stock feed as a means of preventing the dissemination of bovine tuberculosis, and it should, by all means, be pasteurized in making cottage cheese out of skim milk; otherwise you are likely to have an off flavor in the cottage cheese and lack of control, lack of uniformity from batch to batch; or if you make cultured buttermilk out of skim milk you would pasteurize it.

Mr. Wake:

Q. In the handling of pasteurization practice, to what extent, if any, is the maintenance of controlled temperatures vital in the art?

A. Exact temperature control is the important part of pasteurization. Your aim is to use a temperature that is sufficiently high to insure the certain destruction of pathogenic organisms without exceeding certain upper limits which would have detrimental effects on flavor and on the creaming property of the milk, and so you watch the tem-

perature very closely so as not to fall below a certain minimum treatment, both with respect to temperature and holding time, and you also watch at the other extreme that you do not exceed certain temperatures and do not exceed certain holding times, and it is because you don't want to exceed the holding time that you use rather prompt and sudden cooling when the holding period is up.

Q. Does the art of pasteurization contemplate consecutive coordinated steps or may the process be conveniently interrupted at any point to be resumed subsequently?

A. No, the timing is a very important part of the process; also, the fluid does not permit of interruption.

Q. You would say, if I understand, that consecutive coordinated steps are inherent in the plant?

[fol. 71] A. That is right.

Q. Is the elevation of a fluid to a high temperature the use of a mechanical or a chemical process, or is there any combination of the two?

A. I don't know that I sensed the exact import of your question.

Q. Would you like the question read or, maybe, would you think I ought to reframe it?

A. Let me attempt to answer it and then you can interrupt me if I missed the mark as to what you had in mind. Your problem is to raise the temperature from about 55 or 60—let's say that is the temperature of the incoming milk; it might be nearer 40 or some of it might be slightly frozen in the winter time—that is the exception—your problem is to raise the milk from such temperature levels up to 144 degrees Fahrenheit if you want to use the holding process.

The Court: I see that the court will have to be corrected. I pronounced 145 a moment ago. I will accept the amendment.

A. 143 is the minimum for 30-minute holding and most plants try very carefully not to exceed 145; otherwise you have damage to the creaming property, and the result is that most plants strive for an intermediate figure of 144 so as to allow a leeway, a margin of safety with respect to the 143 figure and a margin of safety with respect to the 145 figure. Your problem is to get the milk up to that temperature, and in order to get the heat transferred from the heat medium to the milk you must inevitably have a

temperature radiant to make the heat flow in the desired direction. If you use too high a temperature radiant, having in mind you want to go to 144, you might use a heating medium up as high as 170 or 180. You would get quick heating, everything else being equal, but that would mean that the films of milk immediately adjacent to the heating surface would momentarily be exposed to higher temperatures and you would have detrimental effects, and so, in the process of pasteurization your engineering problem is to design the equipment in such a manner that you get the heating done with reasonable speed but with as gentle a temperature radiant as possible; and the central principle around which the design finally is built is that you get best heat transfer when you have efficient renewal of the surface film that is in contact on the opposite sides [fol. 72] of the heating walls through which the heat must pass. That means that you must have efficient renewal of the surface film of heating water on the one side and you must have efficient renewal of the milk which is being heated on the other side.

Mr. Wake:

Q. And how do you accomplish that renewal of the film of the milk?

A. That is done by imparting agitation. The manner in which that agitation is imparted differs appreciably with the design of the equipment. In an ordinary vat, that would be by agitation of the milk on the inside of the vat and flow of the heating medium over the outside heating wall might be by pump action, pumping the heated water through a channel so it must follow a definite path and flow with a high velocity; or it might be by virtue of a heat exchanger where the water is pumped through a channel on one side of a sheet of metal and the milk flows through channels on the other side of that sheet metal, both flowing at relatively high velocity and usually the counter-current flow with the heating medium flowing in one direction and the liquid to be heated flowing in the opposite direction. There the flow is produced by pump action. But the pumping or agitation is an important part of pasteurization to get the heat transfer with as gentle a temperature radiant as possible.

Q. Would one type of agitation be a sort of a paddle or device similar to it?

A. Yes.

Q. Rotating within the milk?

A. Yes, that would be in a vat pasteurizer.

Q. And there would be other types of physical agitation of the milk?

A. Revolving paddles, revolving propellers, a coil which is like a cork-screw, the coil revolving and that revolving coil in the meantime conducting the heating water through that coil, so that you agitate the milk, and that coil action serves to pump the heating water through the coil. That is another type of agitation.

Q. And if you could give a classification to any of those steps, would agitation be a physical or a chemical proposition?

A. That would be physical.

Q. Would the transfer of temperature or interchange of temperature be a chemical or physical proposition?

[fol. 73] A. The transfer of the heat—the heating process would be physical.

Q. And if someone were to apply the term "mechanical", would that relate to a physical operation as well? What is your conception of mechanical so far as it might or might not enter into the strictly pasteurizing step?

A. Well, ordinarily, when you speak of mechanical you think of moving parts. I would say the agitating incidental to heating and cooling would certainly be mechanical.

Q. Your conception of the method of putting the agitators in motion—how is that usually accomplished; what type of power?

A. In practically all cases in modern equipment now by individual motor drive, each machine being equipped with its individual motor.

Q. Electrical drive?

A. Yes.

Q. Is the machinery or equipment incident to the pasteurization vat itself a type which is carefully designed or is it something that, in practice, anyone constructs or can construct right at a dairy?

A. The motor or the whole—

Q. The whole unit; the vat, including the agitator.

A. The vats and equipment that you have in use is built by firms that specialize in building that type of equipment, and there are certain requirements which would not at once

be obvious to a novice in that field, and so it is a case of specialized construction and calling for specialized experience and skill.

Q. Now, in the steps of pasteurization, Doctor, from your knowledge could you state whether or not there are any chemical changes induced in the milk?

A. There are some chemical changes. Some are definitely desired. In a sense, of course, the destruction of the bacterial cells which we get in pasteurization is chemical because by virtue of heat we produce chemical changes within the living structures of the cells and that is killed. But, aside from that, we have chemical change in the sense that we destroy and destroy certain enzymes in milk, and we do that quite deliberately, such enzymes as lipase, which milk always naturally contains, and that allowed to act in raw milk splits the fat, gives us free fatty acids, and butter fat being noteworthy for its high butyric acid content, that butyric acid gives you a very definite odor which [fol. 74] we know in the dairy industry as a rancid odor or flavor. That is one of the problems in distributing raw milk. It is also one of the problems, even more so, in distributing homogenized milk. There, by virtue of having broken the fat up to such fine globule sizes, you would give the lipase an admirable chance to work on the fat, and unless the pasteurization fully destroys the lipase you would have an off flavor developing in the homogenized milk. And so, in the pasteurization we undertake to destroy the lipase. Also, because of tests now applied, we want to be sure that we destroy an enzyme known as phosphatase. Phosphatase, as far as we know, would have no beneficial or adverse effect in the raw milk, but it is always present in raw milk, and in recent years the phosphatase test has come into very extensive use as a means of checking up on the adequacy of pasteurization, so that milk which is sold as pasteurized milk is actually adequately pasteurized, the test detecting under heating by as little as one degree or admixture of raw milk by as little as one-tenth of a per cent raw milk.

Q. That test is a chemical analysis, is it?

A. It is a test based finally on a color reaction, and it is very sensitive.

Q. Now, you have mentioned the induced changes to accomplish overcoming undesirable odors, and you men-

tioned, I believe, the objective of ridding the milk of undesirable material from a pathogenic viewpoint. Is there any other aspect which is one of the objectives?

A. The primary one, of course, is to make the milk safe from the standpoint of pathogenic organisms, but the secondary is to destroy a very large percentage of all bacteria which ordinarily and usually are just harmless, but, in any event, to destroy a high percentage of all of the bacteria that are there in the interest of enhancing the keeping quality of the product.

Q. The preservation?

A. That is right.

Q. Do you associate flavor with the odor, or is there any independency?

A. They are technically — flavor you would perceive by your taste buds and odor by your olfactory nerves, so you could make a distinction, although the distinction is hard to maintain. We smell things that we sometimes think we taste.

[fol. 75] Q. Well, in connection with the objectives of pasteurization is that a separate objective or is that related to the riddance of offensive odors?

A. Well, I mentioned the destruction of lipase to avoid certain deterioration as far as flavor and odor is concerned; but in pasteurization there is also some, especially if an open system is used, such as vat pasteurization followed by cooling by having the milk cascade down over a cold surface and the film of milk exposed to the air in the meantime—in such systems there is, of course, an opportunity for certain volatile substances from the milk to escape, so that if the milk had a cowy or barny odor pasteurization in such an open system would tend to reduce that.

Q. Would that be a form of aeration?

A. Yes.

Q. Without attempting to characterize any dairy which is here before the court, what is the usual turnover of milk just as you know it in the industry after it reaches the cooling room? In other words, what I am trying to get at, is there any known characteristic of the industry as to the sale of the product once it reaches the cooling?

A. Well, the aim is, and certainly the very typical operation is, to have the milk which was received, let's say, during the forenoon of today to be pasteurized and bottled

and cooled and put in the cold room during the latter part of today, going out on the delivery trucks tomorrow morning, and only enough put up and bottled to take care of tomorrow morning or tomorrow's deliveries. In many cases the practice is not to send out hold-over milk at all, just to bottle and prepare for the day-to-day operation.

Q. Is there a desired reason for holding it any length of time?

A. Not in the case of milk. Your aim there is to process it, bottle it and cool it and get it into the consumer's hands as promptly as possible.

Q. What can you say, if anything, about the formation of cream lines or the handling of milk in respect thereof?

A. You want, of course, your product to show up favorably in the consumer's estimation from the standpoint of the amount of cream he sees in the bottle, and that cream layer shows up, almost without exception, within two hours after the milk is bottled, and actually shows up a little more distinctly with age, but the actual volume of the cream layer may actually shrink as the creaming progresses.

[fol. 76] Q. Now, homogenization—what type of a process is that?

A. That is pumping milk under—milk or other fluid under high pressure, usually around 2500 to 3,000 pounds per square inch, through a controllable orifice or crevice, and the high velocity flow of the liquid through such a limited crevice exerts a shearing effect on the liquid and has the effect of breaking up the fat globules, which is the desired result.

Q. Would you characterize that as in any respects mechanical or in any respects physical?

A. It is definitely mechanical.

The Court: We will take our morning recess and resume at ten minutes after eleven.

(Whereupon a recess was taken.)

After Recess.

HUGO H. SOMMER resumed the stand, was examined and testified further as follows:

Direct examination (continued).

By Mr. Wake:

Q. Doctor, what is the desired temperature for holding or storage rooms or the aim?

A. The common aim is to have the storage room at 38 to 40 degrees Fahrenheit.

Q. Directly after the cooling incident to the pasteurization, would the continued holding of milk at a temperature of about 38 to 40 degrees for a reasonable period, let us say just to test it, 12 hours, have a theoretical further value of destroying additional bacteria if any had escaped up to that time?

A. No.

Q. Would there be a tendency to kill any life during that period?

A. Merely by holding it 12 hours at 38 to 40 subsequent to pasteurization?

Q. Yes.

A. That would be very questionable.

Q. There is a theory entertained that there may be some value of that description?

A. I think I mentioned the theory in connection with [fol. 77] suddenness of cooling, real quick cooling from a high temperature to a low temperature, might have some beneficial effect, but even that is questionable.

Mr. Wake: You may cross-examine. I might say to the court at this time that I am not disposed to enter any technical objection to material that might not be strictly within the realm of cross-examination, it being understood, however, that I wouldn't wish to have the witness other than the government's witness for that purpose, my indication of the statement being that we both felt that we would like to conserve the Doctor's time to the utmost, and that I am willing that counsel can enter new subjects without my objection, it being understood, however, that they make the witness their witness for that purpose, that being wholly a determination for the court to the extent they do it.

The Court: All right. Go ahead.

Mr. Wake: Is that satisfactory?

Mr. Miller: That is satisfactory.

Cross-examination.

By Mr. Miller.

Q. Dr. Sommer, when you made your estimate in response to the question as to the investment in pasteurizing

equipment that would be necessary as against a milk distributing plant that did not pasteurize and you answered that it would cost about 15 to 20 per cent for pasteurizing equipment, that was not a comparison of all the equipment that a dairy might have, including the delivery equipment, was it?

A. No, I tried to enumerate the equipment I had in mind, starting with the intake equipment, weighing can, can washer, a pump, storage tank, filter, then pasteurizer or not having a pasteurizer, a cooler; if you have a pasteurizer your cooler would have to be of larger capacity because you have more of a cooling job; bottling, and then, finally, the cold room. Enumerating that equipment, just as a rough guess I would say from 15 to 20 per cent.

Q. I see. Well, you can't make any estimate as to the value of the equipment as compared to the entire equipment of a dairy engaged in purchasing and delivering milk?

A. Well, if you include in addition now the delivery trucks and, inevitably, you must have a plant, then, of course, the percentage goes way down—the percentage that the pasteurizing equipment represents of the total investment.

[fol. 78] Q. Then, it would be a fraction of that 15 to 20 per cent?

A. That is right.

Q. Doctor, I show you this copy of Exhibit 1. Will you state just what you mean by "pasteurizing equipment", where it begins and where it ends?

A. Well, your pasteurizing would begin with, say, the milk pump, following the holding tank and filter; let's say that milk pump through the pasteurizer; then, possibly, a milk pump or gravity flow, depending upon the ground level, the relative elevation of equipment, and ending with milk cooling coils just ahead of the bottle filler—that part of the equipment—somewhere along the line a pump for the milk, the pasteurizer which involves agitation for the milk and usually pumping of the heating medium, water usually, hot water, and then your cooler which—incidentally, that cooler is very commonly in two sections, the upper part being quite commonly connected with water supply to do part of the cooling, and the lower part being connected with refrigerated cooling medium, which might be

brine or might be sweet water, so-called sweet water cooling, where the water is refrigerated and pumped through.

Q. From your earlier statement, Doctor, I take it you mean that the cooling coils are used in pasteurization only to the extent that they may be larger than those that would not be in pasteurization but would be used to cool milk ordinarily?

A. You would use cooling in both raw and pasteurized milk, but you have more of a cooling job, obviously, where you have heated the milk to a higher temperature.

The Court:

Q. I notice the line going over to "Cream Pasteurizing Vat", an agitator. I suppose that is part of the pasteurizing equipment, isn't it?

A. Whatever I said there was talking about milk. If you contrast distributing raw cream versus pasteurized cream, that same thing would hold true in that line.

Q. Counsel showed you Exhibit 1 and that appears to be on Exhibit 1, so I wanted to call it to your attention.

A. Yes.

[fol. 79] Mr. Miller:

Q. Doctor, in the case of raw milk would it not be necessary to cool that as rapidly as possible just as well as in the case of pasteurized milk?

A. Your aim in any milk plant operation is to get that milk down from the receiving temperature, which is commonly around 60 to in the neighborhood of 40 degrees Fahrenheit, as promptly as possible. Your check further bacterial growth either by prompt heating and pasteurizing and cooling, or if you mean to hold it as raw milk then you apply your cooling just as promptly as possible after you receive the milk.

Q. Isn't it a fact, Doctor, that there are more raw milk plants or raw milk distributors than there are pasteurizer distributors in the United States?

A. Yes. I think the survey made by the U. S. Hygienic Laboratory—I think that was the agency that made the survey in 1936—showed in point of plant numbers more raw milk distributing plants than pasteurizing plants.

The Court:

Q. Does that mean there was more raw milk in total volume was put out to the public than pasteurized?

A. No. I think the same survey showed that in municipalities of a thousand or above in population, basing the conclusion on that population, 74.7 per cent of the milk was distributed and consumed as pasteurized milk.

Mr. Miller:

Q. Dr. Sommer, was this the report that you were referring to?

A. Yes.

Q. To your knowledge, is there any later report made by any responsible public agency or any other agency with respect to the extent of pasteurizing of milk or the extent to which there are distributors of milk who distribute unpasteurized milk as against distributors who distribute pasteurized milk?

A. There is no later report as far as I was able to determine; in connection with getting out the 1946 edition of the text book I made an effort and had some correspondence with the U. S. Department of Agriculture and failed to get any further information of that nature.

[fol. 80] Mr. Miller: Thank you.

Mr. Wake: May I inquire of counsel what the nature of the publication is? Identify it in the record.

Mr. Miller: I haven't offered this at this time, but if counsel wishes to look at it—

Mr. Wake: I would like to know the nature of it, the title of it. Do you want to describe it?

Mr. Miller: For the purpose of the record this is Public Health Bulletin No. 245, Milk Supplies and Their Control in American Urban Communities of over a Thousand Population in 1936, and it is an official publication of the United States Treasury Department Public Health Service, Washington, D. C., published—or printed in the year 1939. (Defendant's Exhibit A.)

The Court: Very well. That is sufficient identification.

Mr. Miller:

Q. Dr. Sommer, the pasteurization method isn't the only method of killing germs which may exist in milk; isn't that true? It isn't the only possible method?

A. Well, you, of course, can go beyond that and actually elevate the sterilizing temperature and sterilize.

Q. You mean boil, the same thing?

A. Well, as in the separated milk manufacture where you use temperatures of around 240 and maintain for 15 to 18 minutes, then you undertake to destroy the bacterial spores as well as any vegetative cells and achieve actual sterility. Aside from that, it is of theoretical interest if you can—

The Court: We are not interested in any theoretical interest. We want to know what they are doing.

A. Practically, I would say no, then, but your question, is there any other method of destroying bacteria—

Mr. Miller:

Q. Any other possible method.

The Court: If you are talking about possible — I don't want you to be delving into theory. We are involved in a practical situation here. Let's confine ourselves to that. I am short on time here and I don't want you to spend more time than necessary trying this case.

Mr. Miller:

Q. Well, isn't it a fact, Doctor, that in many farm homes throughout the United States and government homes they [fol. 81] pursue somewhat the same method of killing germs, merely heating the milk at home?

A. Yes, the heating of milk on the farms is a fairly common practice.

Q. You don't contend that home milk has harmful germs in it, do you?

A. No.

Q. These chemical changes that were referred to—are they considered to be incidental to the pasteurization or are they the desired end for which pasteurization is entered into?

A. Well, they are a part of it. I don't know that you can—I would say that the main purpose is the destruction of any pathogenic organisms that may happen to be present. The secondary purpose is to lower the bacterial numbers and enhance the keeping quality thereby; also to destroy certain enzymes. Now, those are secondary. If it

weren't for the primary objective it is doubtful whether the practice would have become anywhere near as widespread and well established as it now is:

Q. What is certified milk, Dr. Sommer?

A. It is milk produced under the supervision of a medical milk commission and in conformity with the detailed requirements that have been set up for certified milk. That gets into numerous details which are not easily recited; but some of the outstanding details are that the health of the herd and of the attendants is under the supervision of veterinarian and physician, respectively, and the bacterial count of the milk must not exceed 10,000 per cubic centimeter.

Q. When you said that the milk is produced under the supervision of this society you don't mean that they actually have a representative watching whatever happens to the milk, do you?

A. No.

Q. You mean, merely, that they lay down certain standards?

A. That is right. They lay down the standards and insist that a medical milk commission must be organized and a veterinarian and a physician designated to do the necessary inspecting at periodic intervals, as well as all of the other details of production code, if you can call it that.

Q. Is there any processing of the milk by the dairies and distributors after it comes to them from the cows?

[fol. 82] A. In the case of certified milk?

Q. That is right.

A. There may be. For years certified milk was sold as raw milk and was understood to be raw milk, but the pasteurization of certified milk is now permissive; so, certified milk may or may not be pasteurized.

Q. Where it is not pasteurized there is no processing of any sort; is that your answer?

A. Merely the cooling and bottling operation.

Q. In your opinion, Dr. Sommer, is certified milk a wholesome food product fit to sell for consumption?

A. Yes, definitely.

Q. Isn't it true that any milk from a healthy cow is generally regarded as a wholesome and beneficial food fit for consumption—for sale with or without pasteurization?

A. Yes.

Q. Is that in your opinion true, as well?

A. That is right.

Q. In the production and distribution of the milk from the cow to the large city consumer, or even in a small town, what would you say is the most common source of a disease-producing bacteria which may be found in milk, that is, what part of whatever happens to the milk from the time it leaves the cow until the time it is distributed?

A. The most common—that would imply a survey of statistics and I have in mind in that connection the compilation of epidemics that have been traced to raw milk, and typhoid, paratyphoid and dysentery loom up very important in that. So, trying to answer the question as of relative importance, you would have to go to such data as that, and I would say then you would have to look for sources of contamination which would contribute typhoid and paratyphoid organisms, and that would not be the cow itself but might be a typhoid carrier acting as a milk handler or the water supply that is used in connection with the milk utensils, or possibly flies having access to contaminated sources and then again having access to the raw milk.

Q. Well, to put it simply, Doctor, would you say that the greatest source of possible contamination, or the greater, occurs in the distribution, or would you say that it occurs in the source of the milk from the cow itself? Would you like to have that question reread?

[fol. 83] A. Yes.

(Whereupon the reporter read the pending question.)

A. Well, that leaves some things out of the scheme of things. I would like to contrast assembling from the cow to the plant and if you start distribution from that point on, then you have the whole scheme of things included.

Q. I see.

A. But you have points of contamination—the cow itself may be the source of contamination, with tubercle bacilli or the organisms of Bang's disease which would cause undulant fever in humans, or it might be the organism that causes septic sore throat becoming established in the cow's udder, or it might be the organism that causes scarlet fever having become established as an udder infection and richly seeding the milk. So, starting with the cow you have typically bovine diseases, you have typically human diseases that can become established in the cow's udder, and then along the line you have the attendants. You may have a

typhoid carrier or they may contaminate the milk in other respects. So that, I would say that as far as possible contamination is concerned there would be the greatest chance from the time of milking to the point where it is received at the assembling plant. That would include the greatest hazard as far as contamination is concerned.

The Court:

Q. Isn't it true, Doctor, that at least it has been built up, whether there is merit to it or not, a feeling with the public that they are reluctant to buy milk unless it is pasteurized?

A. Yes.

Q. I am speaking from my own experience. I don't think we would permit any milk around our house that wasn't pasteurized.

A. That is true. It has been built up through the teaching of various public agencies, including the U. S. Public Health Service has been quite active to that point, and in my opinion it is a very sound teaching.

Mr. Miller:

Q. Do you know if there are any—strike that.

(Question waived.)

Q. Can you tell us what is the term or term that is generally used in the dairy trade in your experience to describe one who is engaged in the business of buying, bottling and [fol. 84] selling milk as distinguished from those who are engaged in other branches of the milk business?

Mr. Wake: That is objected to on the ground that the characterization wouldn't answer the ultimate.

The Court: Objection sustained.

Mr. Miller: Your honor, may I say a word on that?

The Court: Yes.

Mr. Miller: Your honor, it appears to me that characterization of people engaged in the business might be valuable as to what they consider the most important aspect of their business.

The Court: Objection sustained.

Mr. Miller: Your honor, may I say for the record what this witness would testify to?

The Court: You may make an offer of proof.

Mr. Miller: I make an offer of proof that generally the term used by those who are engaged in the business in the offer of supplying milk is that people who are engaged in the distribution of milk are entitled—ordinarily called dealers and distributors, and that is irrespective of whether they pasteurize milk or not, and that is the commonly used term to describe them; and along the same line, which, I suppose, the same objection would be to that, the association which the people who are engaged in this business have is called the Association of Milk Dealers, and, similarly, the publication which they have is called "The Milk Dealer".

The Court: It will be received only for the purpose of counsel making the offer of proof.

Mr. Miller:

Q. Doctor, do you have any knowledge of how long the business of milk distribution has been in existence as a distinct form of business or activity distinct from farming?

A. Well, historically, the records are not very complete, but you find references to milk business along about 1850.

Q. Have you any knowledge how long pasteurizing has been commonly engaged in by milk distributors?

Mr. Wake: That is objected to on the ground that it is too indefinite, especially in view of the other suggestion that there were a considerable number of raw milk plants still in existence.

The Court: He may answer that. Objection overruled. [fol. 85] A. Pasteurization, of course, based on Pasteur's study of 1864, was slow in coming into use as far as the milk industry is concerned, but about 1890 to 1900 was the period when a great deal of attention was focused on the need for pasteurizing milk by work done in connection with the feeding of infants and children, and 1908 to 1910, along in there, the pasteurization was beginning to take hold pretty well in the dairy industry. However, as early as 1897 it was started on a commercial scale in Cincinnati, and I think 1898 in New York, and 1899 or thereabouts in Philadelphia; in Milwaukee, 1903; Chicago, 1908. Those are some of the dates that mark the introduction of pasteurization of milk on a commercial scale.

Mr. Miller:

Q. Can you tell us about how recently pasteurization of milk has become common in Milwaukee?

A. I have made no study of it, but I would say that by 1910 to 1915 it was well established and quite general.

Q. To your knowledge are there any dairies in Wisconsin engaged in pasteurization or bottling and selling as a business separate and distinct from the buying and selling and distributing of milk?

A. You mean a dairy that would buy the milk and bottle it and then sell it wholesale?

Q. No, I don't mean that. Do you know—I mean dairies that are engaged in pasteurization and bottling for others as a regular business.

A. No, I don't know of any. Certainly not the rule. If such exist it would be the exception, I would say.

Q. Have you ever heard of any such dairy in the United States, generally?

A. There may be some. From correspondence I have had and inquiries and conversations, I have heard of instances where somebody wanting to distribute pasteurized milk in a suburb undertakes to buy it in wholesale from somebody else and undertakes the retail selling and peddling of the milk and making collections on his own responsibility.

Q. I see. But the company that pasteurizes and bottles the milk would do that incidental to its regular business?

A. That would be a side issue, I would say.

Q. Do you know if there are in Wisconsin to any substantial extent dairies engaged in purchasing of milk and [fol. 86] pasteurization and bottling, that is, purchases as well as bottles, and selling to other dairies for distribution?

A. I don't know of any.

Q. Is it customary for the public authorities in various States of the United States to examine the milk-producing cows for various diseases, some of which you have mentioned before?

A. With respect to some especially; examination of cows for tuberculosis by the tuberculin test is well nigh universal practice, if not actually required everywhere.

The Court:

Q. How about Bang's disease?

A. Bang's disease is also now—testing for Bang's disease is now also being extensively required, although it is not a hundred per cent as yet. There are general provisions specifying that the milk must be from healthy cows, and

udders must be free from infection, and so on, which, however, are difficult to administer. After all, it depends pretty much upon the individual farmer and herdsman to be high minded about following such directives.

Mr. Miller:

Q. Well, isn't it a fact that practically every State in the United States cows are examined?

A. For tuberculosis and, to a considerable extent, for Bang's disease.

Q. Do you know of any dairies anywhere in the United States that produce their own electric power?

A. I don't know of any.

Q. Would you know if there were some?

A. Not necessarily, although that would be rather unique and it might well appear in trade papers, and I haven't seen any such account.

Q. How about in the State of Wisconsin? Can you be fairly certain that there are or not any dairies that produce their own electric power?

A. Of course, dairy is a broad term. I know evaporated milk plants generate their power, to a considerable extent, and it is conceivable there might be a plant like that that indulges in some side activity, and so on. It is pretty difficult to answer. As a general thing they do not generate their own power.

[fol. 87] Q. That is, the distributors?

A. That is right.

Mr. Miller: That is all.

Mr. Wake: Just one or two questions.

Redirect examination.

By Mr. Wake:

Q. This mention, Doctor, of attempting in the farm to control milk by heat, from your knowledge would you say that was, broadly, an effective method?

A. Well, it is effective for making milk safe. It is not effective if you consider it from a standpoint of the marketability of that milk if you were in competition with milk distributors, because you have the scalded flavor and impaired creaming.

Q. Is scalded sometimes referred to as a caramelizing action?

A. Well, caramelizing action you would think a little more severe. A cooked, scalded flavor would be more truly descriptive.

Q. And does it strike you that there is any effective comparison between a modern pasteurization plant and an attempt in the average farm home to, by use of heat, render milk safe?

A. The two are not closely comparable at all because in describing pasteurization I am emphasized the importance of employing a very gentle temperature radiant, and that is very difficult on a small scale on a kitchen stove to duplicate.

Q. Now, from your knowledge of the industry, is there any relation in the size, the average size of plants in the United States, these bulk plants you referred to under the census where only raw milk is handled and bottled or the plants where pasteurization is a distinct business is undertaken?

A. Well, the raw milk distributors are, for the most part, limited to the milk produced by an individual farm; they are limited as to size, and when they become larger there is quite a tendency among public health officials to discourage that type of operation because by the time you assemble milk from several farms and have a large number of attendants and several different water supplies become involved, you multiply the possible sources of contamination. Not only that, but you multiply the number of consumers that [fol. 88] you may be subjecting to that. So, as you pool more and more milk the hazard becomes more and more startling, and raw milk operations of any scope are discouraged.

Q. Once pasteurization is introduced into a plant does that functionalize the plant as to how the rest of the operations fill in, or do the other parts of the plant go on in their independent ways?

A. Along with pasteurization immediately many other operations become possible, such as turning out chocolate milk drinks and cultured buttermilk and that type of operation which requires pasteurization.

Q. Now, does the dairy plant strike you as having the type of electric load, from your knowledge of it, whether it is a steady, even load, or whether it has extreme ups and

downs, which would either encourage such a plant or discourage it from having its own source of electrical energy?

Mr. Miller: Your honor, I object to that. The witness hasn't been qualified on electrical energy to any extent that I know of.

The Court: Objection overruled. He may answer, if you know.

A. In the average dairy the demand for power varies considerably; especially when they cut in a machine like the homogenizer where they may have a 20 or as high as a 60 horse power motor running the machine, depending upon capacity, you have severe ups and downs in the demand.

Mr. Wake:

Q. And evaporated milk plants, through your knowledge of those, are they of the type which have fairly large production of steam anyway and the process and development of electrical energy may, in part, be incident to the development of steam?

A. That is right. They make use of the fact that they want low pressure steam for many purposes and use the exhaust steam from their generator to do the heating.

Mr. Wake: That is all, Doctor.

Mr. Miller: May I ask one question?

The Court: Yes.

[fol. 89] ~~Re-cross~~ examination.

By Mr. Miller:

Q. Dr. Sommer, would you say that the difference between the killing of germs in a farm by a housewife with a smaller degree of efficiency differs greatly from that which is done by a dairy in the degree of efficiency or operation, or would you say it differs in any other respects?

The Court: He told how it differed and the difficulty in keeping an accurate temperature, for instance, 144; you can't do that on a kitchen stove, as you and I well know. If there is anything further you want to inquire as to that, all right.

Q. Anything further you want to say about that, Doctor?

A. Well, it is difficult to do the job with any precision.

The principle, of course, is destroying bacteria by heat, but you inevitably go much higher than you need by heating it on the kitchen stove. - Either the entire mass of milk is heated hotter or locally where the film of milk is in contact with the hot bottom of the dish; you have no agitation, and you get a cooked, scorched flavor—a cooked, scalded flavor and you impair the creaming property of the milk.

Mr. Miller:

Q. I take it by the home heating method you may actually be killing more bacteria?

A. That is right.

Q. Than you would in the pasteurization?

A. That is right.

Mr. Miller: That is all.

Mr. Wake: That is all.

(Witness excused.)

The Court: Next witness.

Mr. Wake: The plaintiff rests, your honor.

The Court: We will proceed until about twelve-fifteen, so go ahead.

[fol. 90] Defendant's Evidence

Mr. Miller: Professor Mortenson, will you take the stand?

WILLIAM P. MORTENSON, called as a witness herein, on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Miller:

Q. Will you state your name, please?

A. William P. Mortenson.

Q. Will you state your occupation, Dr. Mortenson?

A. Associate Professor of Agricultural Economics at the University of Wisconsin.

Q. Do you specialize in any field, Doctor?

A. Practically all of the research which involves a considerable portion of my time has been in dairy marketing with special emphasis on fluid-milk marketing.

Q. How long have you been engaged in this research?

A. Made the first study about 1931 in Milwaukee. It was published in '31. The study was made in '29 and '30.

Q. And have you been engaged in similar activities since that time?

A. Yes, a great portion of the time.

Q. What education have you had, Doctor?

A. Final, Ph.D. in agricultural and general economics from the University of Minnesota.

Q. Have you published any books?

A. Yes; one book under the title "Milk Distribution as a Public Utility", published by the University of Chicago Press, 1940.

Q. Do you know whether or not there are any dairies in Wisconsin engaged in pasteurization or in pasteurization and bottling as a business separate and distinct from buying and selling and distributing of milk?

Mr. Wake: May I have that question read?

(Whereupon the reporter read the pending question.)

A. I know of none.

[fol. 91] Mr. Miller:

Q. Do you know of anywhere in the United States?

A. I do not have specific knowledge. I understand that there are some so-called small peddlers in cities, such as perhaps New York, but I believe, although I can't give positive information—I believe they buy their milk from a distributor who pasteurizes it.

Q. Is this distributor engaged in pasteurization for these peddlers as the main part of his business or is that just incidental to his business?

A. Purely incidental.

Q. Do you have any knowledge of the distance from which milk is brought by milk dealers in Milwaukee?

A. The bulk of the milk for Milwaukee is purchased within 30 to 35 miles. The limit—the greatest distance is about 45 to 50.

Q. According to the stipulation which has been entered into here by counsel the cost of the plant operators in connection with the distribution of milk by the dairies involved in pasteurization in this case is about one cent per quart.

Do you have any opinion as to what proportion of that cost of plant operations may be attributed to pasteurization?

A. I would say the variation would be considerable from plant to plant. It would be only in rare cases, in my judgment, that it would be more than 10 per cent, and I think in most cases it would be distinctly below 10 per cent.

Q. Is that 10 per cent of one cent?

A. That would be—in that case it would be one-tenth of one cent per quart or less, on the basis of a cent per quart of plant operation.

Q. Can you explain for the benefit of the court what you mean by "pasteurization"?

A. As I understand, pasteurization is the heating of milk—there are several processes, as Professor Sommer explained—the common process, as I understand, as used in the plants here in Wisconsin, is the heating of milk to 143 to 145 degrees; holding it there for 30 minutes. That is all that would be construed to be strictly pasteurization in a plant operation.

Mr. Wake: Well, that is—

A. In a plant operation—

The Court: Wait just a minute.

[fol. 92] Mr. Wake: That is objected to upon the ground that it doesn't appear that the witness is technically qualified to describe pasteurization as such, and I believe in certain aspects it is in contradiction, at least in part, with Dr. Sommer's testimony.

A. I was going to make one more statement, if I might.

The Court: Go ahead and make your statement.

A. The other part which would be a practical part in a plant operation would be the cooling of the milk down to the desired temperature.

Mr. Wake: I withdraw my objection.

Mr. Miller:

Q. With your estimate as to the amount of that one cent that is attributable to pasteurization, did that include both the heating and the cooling?

A. I would say that would include both heating and cooling, because the only difference in cooling would be to

change the milk from the temperature of 143, or whatever the temperature is after it leaves the vat, to the temperature at which it reached the vat or the intake.

Q. And in your estimate did that take into account the electricity which might be involved in this pasteurization process?

A. Yes. I would include in that the electricity, the cost of water, and power. Now, the basis for arriving at that is the computation which I have made in a considerable number of plants of the cost of these items, water, electricity and power, and then determine the proportion of that which goes to the pasteurizer. It would take a time study to get the exact cost—time study and temperature study and everything to get the exact cost. I know of no plant that separates pasteurization cost, as such, but it can be calculated quite accurately by indirect methods which I have suggested.

Q. In your estimate, then, did you take in all the costs that you considered in pasteurization or only those that you have just stated?

A. All the costs, including labor, would be in that one-tenth.

Q. To your knowledge do any of the milk distributors or dealers in the State of Wisconsin produce their own electricity?

A. I know of none. You are speaking of milk distributors?

[fol. 93] Q. That is right.

A. I know of none.

Q. How about in the United States generally?

A. I am sorry, I don't happen to know. I just know of none.

Q. In your studies in connection with the operation of milk dealers and milk distributing businesses have you had occasion to observe that any of these businesses have engaged in the distribution of food products which are not related to milk?

A. Yes. It, in fact, is quite a common practice to engage in the distribution of some other products.

Q. Can you enumerate some of the products?

A. A good many engage in the distribution of eggs, fruit juices quite commonly, such as grape juice, orange juice, several other fruit drinks.

Q. Well, how do they obtain these food products which they distribute?

A. They purchase them from manufacturers or vendors of the fruit juices.

Q. Do you know of any other food products which are treated for the purpose of cleaning them or removing possible detrimental bacteria similar to milk in the sense that such cleaning is engaged in by distributors?

A. In the case of certain vegetables and fruits that would be quite common. In the case of peaches that are sprayed to protect against insects, that spray may be dangerous to health, so they are either brushed or washed. Plums, apples—almost universally washed in order to remove the spray that might endanger health.

Q. Who does this washing and cleaning?

A. Well, the handler or the distributor of the fruit.

Mr. Miller: That is all. You may cross-examine.

The Court: Cross-examine. We will finish with this witness before recess so he can leave if he wants to:

Cross-examination.

By Mr. Wake:

Q. In the distribution of these fruit juices have you personally looked into the method in which the dairies in Milwaukee County are handling that situation?

A. Not so much in Milwaukee. I have observed it closer in other markets and those same companies who operate in the other markets also operate here. I imagine it would be similar.

[fol. 94] Q. Is this a fact from your understanding; that they acquire—the dairy acquires a fruit concentrate and then mixes it to proportion in its own plant and bottles it?

A. It may be done. The plants that I happen to know have it sent to them in the form in which they sell it.

Q. But you haven't inquired specifically in the Milwaukee area about that?

A. I have not.

Q. In your statement that generally the industry, so far as you personally knew, the plants anyway, didn't separately calculate the costs of pasteurization, that indicates that from an accounting standpoint most of them—most of

the pasteurizing plants do not functionalize their accounting in the pasteurization line; is that right?

A. That would, I think, be true. The common accounting makes a charge for particular items—water, electricity, so on. I should add, however, that in discussing the functionalizing of the accounting which you mention, if a company did that I think they would find that they would—if they would take an item as small as pasteurization in total cost it would be virtually microscopic; it would not be worth while to keep accounts in that minutia.

Q. It is also true, isn't it, that the plants are so organized and so run in conjunction with the pasteurizing equipment that it is difficult to allocate some overheads of time—difficult to allocate some overheads of the method in which milk passes from the receiving room into the bottle?

A. That would be true. The only way to arrive at that, as I tried to mention a moment ago, would be through time studies; how much was certain labor, how much time did they devote to this particular process, how much water was used in heating the milk for pasteurization, and so on.

Q. Did you apportion any administrative and general expense, as that classification is usually known, to your cost of pasteurizing in your estimate?

A. That would be included in that. The administrative expense is a very small proportion of the total overall expense.

Q. Have you got your work sheets showing the origin of one-tenth of a cent under the assumption that plant costs in general are on a basis of one cent?

A. I took it this way.

Q. No, just tell me, have you your work sheets on that?

A. I do not, no. The calculations that I made on that [fol. 95] would not lend themselves, I think, to specific statistical or accounting procedure.

Q. You don't know anywhere that those figures are separately published in any recognized publication, do you?

A. I have seen such a figure. It has—I think, however, that there might be considerable argument as to the validity of an accounting procedure that would attempt to allocate that specifically, because it would have to be more or less arbitrary.

Q. In your obtaining the figure which you have mentioned, what did you consider to be the cost of investment

or depreciation in the depreciation annual requirement on the investment?

A. Well, the estimate would be based on the relative cost of each piece of equipment and the life of that equipment.

Q. What was your starting base? What was your unit by which we can see the steps of your procedure?

A. Well, the costs of each piece of equipment, beginning with the intake, ending up with the cooler; the amount of labor—that would be the equipment cost; the amount of labor which would be allocated to the process of pasteurization.

Q. Professor, are you generalizing this or have you attempted to actually set some figures in their relationship one to the other?

A. I have attempted in going through the plant operations to estimate as best one could about what it would be. As I said before, it would be extremely difficult to set down statistical figures and say, "These are correct." If they were correct for one plant they may vary somewhat for another, first. Second, those figures would have to be arbitrary because unless you could determine the amount of water that was needed for that pasteurizer it would be difficult. You could estimate, however, and be very close, that the cost of operating a pasteurizer would be small as compared with all the other combined. It is one piece of equipment in a plant.

Q. Well, now, on the theory that pasteurization is one-tenth of a cent based, in turn, on an equivalent of one cent for overall plant operation, what is the cost of water which was assigned in that category?

A. What is the cost that would go to pasteurization?

Q. Yes.

{fol. 96] A. Oh, it would be—the water itself, not the heating of the water?

Q. Just the water. You indicated that water was one of the items.

A. The total cost of water in a plant is extremely small for all the water that is used.

The Court: If you are going into this detail it is apparent we can't get through with this witness. We will recess until one-thirty.

(Whereupon a recess was taken to 1:30 o'clock P. M. of the same day.)

Milwaukee, Wisconsin,
Wednesday, September 25, 1946,
1:30 o'clock P. M.

Court met pursuant to recess last above noted. All parties present.

WILLIAM P. MORTENSON resumed the stand, was examined and testified further as follows:

Cross-examination.

By Mr. Wake (Continued):

Q. Professor Mortenson, in the use of your percentage relationships—I am referring now to your overall plant costs as a hundred per cent and your relationship of 10 per cent thereof for pasteurization cost—did you include or exclude within that 10 per cent the element of plant lighting?

A. May I take about, maybe, four minutes to develop just how I arrived at that?

Q. Well, I would prefer to ask you some specific questions.

A. It would be extremely difficult without taking the steps which we used to tell you how we arrived at it. There are seven different items that I would like to enumerate to show just how we arrived at that one.

Q. You mean you merely wish to specify them at this time?

A. Just specify with one or two words.

Q. All right. No. Do you wish to enumerate or develop them?

[fol. 97] A. Enumerate and explain by two or three words what is involved in each one. It is not a development.

Q. All right. I have no objection.

A. In the pasteurization we have just one out of about seven major operations in the milk plant and these seven are the intake where the milk is dumped, the cans are washed and returned to the trucker, the milk is weighed, and the weighing can is washed at the end of the day—

Q. Just enumerate them. Intake is one.

A. Second is a boiler; third, a bottle washer; fourth, the bottle filler; fifth, the refrigerator, including all the cold

storage space; sixth, the platform where the milk is loaded onto the trucks; and then the pasteurizing process.

Q. The pasteurizer?

A. The pasteurizing process; that is the seventh.

Q. Now, on the platform, did you include that as plant cost or did you exclude it?

A. We included plant cost up to the point that the milk was turned over to the delivery man; moving it onto the platform is part of the plant cost. Moving it onto the truck is a delivery cost.

Q. Did you include anywhere within the pasteurization figure, in percentage, any portion of the lighting load of the entire plant?

A. Yes. We arrived at that by taking in our study three items; the lighting, which included all electricity, the power and the water. Those three items for 13 Wisconsin companies over an 11-year period added up to 3.3 per cent of the total operating cost. That includes delivery.

Q. What was the lighting?

A. We did not separate the three; light, power and water. Those are usually run in the accounting system as combined. Consequently, we didn't attempt to separate those three.

Q. Now, what method of apportionment did you use for deriving the total energy bill for electricity used for lighting loads in order to give a portion thereof to pasteurizing?

A. We did not attempt to separate the electricity which runs the motor from the water which heats the milk.

Q. No, I am referring to the lighting in the plant.

A. That was not listed separately.

Q. So, as far as you know your calculations give no effect to that?

A. It simply includes the light, which is all electricity, [fol. 98] the power and the water, as that one item which comprises 3.3 per cent of the total operating cost.

Q. I just want to reduce this to a common understanding.

A. Yes.

Q. The lighting in the plant was not separately studied in order to give a portion of its total cost assigned to the pasteurization as distinguished from any other activity in the plant?

A. That is correct; it was not separated.

Q. When you assigned the cost of water you had no dis-

inct formula for assigning any portion thereof to pasturizing as distinguished from the other parts of the plant operation, did you?

A. That is correct, we did not.

Q. Would the same general remark be true in respect of heating that was generally true in the items just mentioned?

A. Yes. No attempt was made to allocate the cost of heat or light to any one operation, such as pasteurization. I might develop that just one point farther, the reason being that all those three combined were such a small percentage of the total overall costs.

Q. Well, you are just drawing that as a conclusion. You have never seen figures on those percentagewise, have you?

A. Yes. I have the percentages of the three items; electric light, power and water.

Q. Stated another way, the combined cost of those is very small compared to overall plant costs?

A. That is right. It is 3.3 per cent.

Q. Now, it is true, isn't it, that a dairy which employs pasteurization as a process functionalizes its entire plant in respect of the milk passing through that pasteurizing equipment?

A. What I think happens in a plant operation, a certain number of men take care of the plant. The pasteurizer is more or less automatic. All it needs is an attendant. The milk is pumped in through pipes, pumped out through pipes, so that no specific person is assigned, ordinarily, to a pasteurizer the way it is to an intake. There the milk is dumped by one individual or two. Likewise, when the milk is moved from the refrigerator out onto the platform it is done by one [fol. 99] or two individuals. I know of no plant that has specific men assigned to the operation of the pasteurizer and his time devoted to that only.

Q. But the scheduling of related or dependent operations must be scheduled around the milk passing through the pasteurizer; isn't that right?

A. I would hardly think so. I would think that the scheduling would be more around the intake. That is the part of the plant that is always—ordinarily where your so-called bottleneck exists, and the plant operation—the plant equipment is more or less set to that, and taking the experience in a plant—

Q. May I interrupt there?

A. Yes.

Q. Where you use these holding tanks that character is equalized, the purpose of the holding tanks being to temporarily store the intake product until it can be scheduled through the pasteurizer?

A. That is correct, and if the intake can operate at a greater speed or dispatch, greater volume than ordinarily, a plant adds another holding tank, if it is necessary, to get the milk away from the receiving tank.

Q. And if the intake peaks up to the point where what is commonly known by some of us as a bottleneck, then it would call for installing additional pasteurizing equipment, wouldn't it?

A. I would think ordinarily not. I think it would call for the installing of more holding tanks and cooling the milk at the receiving before it moves into the first holding tank.

Mr. Wake: I think that is all, Professor.

Redirect examination.

By Mr. Miller:

Q. Professor Mortenson, what is the price of milk in Milwaukee at present?

A. I believe standard milk is 16 cents.

Q. Were you ever connected with any specific dairy?

A. Yes. I was connected with the Sheffield Farms Dairy at New York for a period of some sixteen months.

Q. During what period of time?

A. Beginning April, '43 to September, '45.

Q. What were your duties at that Sheffield Farm?

A. As economist for the company. The specific duties included going over the accounts, trying to determine where [fol. 100] costs might be saved, what particular plant operations may be over-expensive, and could be reduced, and the general work which related to economies of distribution of milk.

Q. And is your present estimate based, in part, upon the experience which you obtained in that employment?

A. The data which I have submitted so far do not include the information from the Sheffield Farms. That would be separate. The data which I have given come from the study which I made myself and which is published in the book, "Milk as a Public Utility".

Q. Is the data which you have submitted supported by similar data as the Sheffield Farm?

Mr. Wake: That is objected to unless that data is produced for separate examination.

The Court: I think the witness is well qualified. I don't think you need to go into it any further. You have got his opinion and idea.

Mr. Miller: That is all, your honor.

Mr. Wake: No further questions.

The Court: Next witness. That is all.

(Witness excused.)

Mr. Miller: If your honor please, I should like to offer at this time this booklet which was previously identified as Defendant's Exhibit A by Professor Sommer, Public Health Bulletin No. 245, published under the United States Treasury Department Public Health Service.

The Court: It will be received.

(Said document, marked "Defendant's Exhibit A", so offered, was thereupon received in evidence.)

Mr. Miller: I don't intend to read—

The Court: I suppose you gentlemen want to submit briefs. If you want to have any quotations you can say them for the brief. I will be trying a lot of cases between now and the time the briefs are in, and I will probably forget what you tell me.

Mr. Miller: Very well. Mr. Schiek.

[fol. 101] GEORGE SCHIEK, called as a witness herein, on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Miller:

Q. Your name is?

A. George Schiek.

Q. Mr. Schiek, what is your occupation?

A. I am the secretary of the Layton Park Dairy Company.

Q. You are the secretary you say. Will you state what your functions are?

A. General plant operation, in charge of plant, butter making, and so on.

Q. Speaking a little louder, please.

A. In charge of plant and butter making and pasteurizing, and so on.

Q. Are you familiar with the entire operations of the Layton Park Dairy?

A. I am.

Q. How long have you been connected with the Layton Park Dairy?

A. Since 1914.

Q. Were you in the same business prior to that time?

A. I was, just running a single milk route prior to that time, about three years—two or three years—but the Layton Park Dairy was started in 1914; that is when the pasteurization ordinance took effect in the city of Milwaukee.

Q. Is the Layton Park Dairy an outgrowth of your individual activities in conducting a milk route?

A. Yes, sir.

Q. It is. How was the Layton Park Dairy formed?

A. A brother of mine was also in the milk business and two other partners, Scherkenbach boys, and we formed the Layton Park Dairy at that time by combining the four routes.

Q. Will you tell us how you conducted your business prior to the time when you instituted pasteurization of the Layton Park Dairy?

Mr. Wake: I am inclined to object to this as immaterial.

The Court: Objection sustained.

Mr. Miller: That is all.

Mr. Wake: No questions. I would like to ask one question.

[fol. 402] Cross-examination.

By Mr. Wake:

Q. Does your firm handle this orange drink, so-called, or fruit juices?

A. Yes.

Q. I would like to ask you, is that done, in your case, by using a concentrate and mixing it and bottling it?

A. That is right.

Mr. Miller: I would like to ask another question. That wasn't on direct.

The Court: Come back to the stand.

Redirect examination.

By Mr. Miller:

Q. Do you know of other dairies that handle similar products?

A. I think there are several in the city.

Q. Are there any that don't prepare from concentrate but make the complete product and sell and bottle it, if you know?

A. I am not sure. I think there is one in the city that does.

Q. Do you know of any other products that are sold in the city that aren't made or prepared by the dairy that sells them?

A. We haven't any. I don't know of any.

Mr. Miller: That is all.

Mr. Wake: No questions.

(Witness excused.)

Mr. Miller: Mr. Heil.

JOSEPH F. HEIL, called as a witness herein, on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct examinaiton.

By Mr. Miller:

Q. Your name is?

A. Joseph F. Heil.

Q. What is your position, Mr. Heil?

A. Well, I do sales engineering and estimating for the Vilter Manufacturing Company.

Q. What do they build?

[fol. 103] A. They build refrigerating equipment.

Q. And do they specialize in any particular type of refrigerating equipment?

A. Well, we do build ammonia compressors and all its component parts that go with complete refrigerating plants, whether it is an ice plant or dairy plant or an ice cream plant or air-cooling or any typical refrigerating plant.

Q. Do you specialize in any type of refrigerating plant?

A. Well, I have been doing figuring of skating rinks and dairies and breweries, and, well, almost anything that comes along, outside of air conditioning.

Q. How long have you been engaged in this occupation?

A. About thirty-five years.

Q. Are you familiar with the types of refrigerating equipment used in dairies?

A. Oh, yes.

Q. In the course of your work have you designed equipment for dairies?

A. Well, we design everything in so far—outside of the pasteurizing cooler, which is usually a nickel-plated or a stainless steel cooler which is fabricated by these dairy equipment manufacturers, as a general rule. The balance of the equipment that is used in refrigeration is all manufactured or furnished by us, outside of the motors and such parts that are special.

Q. Are you familiar with the types of refrigerating equipment used in dairies in Milwaukee?

A. Yes.

Q. Have you had occasion to examine them yourself, on occasion?

A. Yes. I examined the Layton Park Dairy Saturday morning, as well as Golden Guernsey and Emmer Brothers.

Q. Have you examined other dairies on other occasions?

A. I have been in quite a number of them, yes.

Q. Did you have occasion to make a study in connection with the operation of refrigerating equipment of the dairies you enumerated?

A. Yes. I made a survey of them Saturday morning. I secured the information from the operators as to the quantity of milk.

Q. What was the purpose of your study, if I may interrupt?

[fol. 104] A. To arrive at the possible ton hours or kilowatt consumption required in these particular dairies.

Q. Kilowatt consumption for what types of equipment?

A. For the refrigerating equipment.

Q. Did you divide that into any types of equipment?

A. I didn't understand that question.

Q. Did you divide your studies into the types of equipment used in dairies?

A. Well, I noticed that most of them have practically the same type of equipment, outside of the pasteurizer cooler at the Golden Guernsey being of the more modern type than those—that a- Emmer Brothers and Layton Park Dairy.

Q. Did you ascertain the amount of electrical energy that is used in cooling milk in each of these dairies on that particular day when you were there?

A. Yes, I figured the quantity of regular milk, homogenized milk, cream and skim milk that was cooled after it had been pasteurized.

Q. That is, cooled from the—

A. From the second stage cooling after it left the water section down to the final stage over the ammonia or brine cooler section.

Q. Did you calculate the amount of electrical energy that is used in holding milk after it had been bottled?

A. Yes. I based that on the size of the cold storage room, considering the insulating losses, the quantity of cases and bottles that went in there, and made an assumption as to the amount of water that was also introduced into the room in the cases, as well as the bottles; the men in the room, the lights, and an approximation on the air infiltration because of the door openings through which the cases passed in conveyors—or on conveyors; then, also, the amount of milk that was held in the holding tanks, the length of time they usually operate the refrigerating equipment on the holding tanks for both raw milk, cream and buttermilk.

Q. Will you state the amount of electrical energy that was used in the pasteurizing cooling as against the amount of electrical energy that was consumed on that day by the refrigerating machines that you examined in the holding room?

[fol. 105] Mr. Wake: That is objected to upon the ground that there are many assumptions involved, as the witness has stated; that one day's study wouldn't be probative to the issue.

The Court: Objection overruled. He may answer.

(Whereupon the reporter read the pending question.)

A. Well, the kilowatt hour consumption for pasteurization of the milk, cream, skim milk—

Mr. Miller:

Q. Are you confining your answer to a particular dairy now?

A. Yes. — averaged about 32 per cent of the total. That, of course, was due to the fact that the water temperature was rather low on Saturday.

Q. Will you state the conclusion, then we will get to the reasons later?

A. I say it was about 32 per cent of the total, I would judge.

Q. In what dairy?

A. Well, that seemed to average about the same throughout.

Q. Which dairy?

A. Layton Park, for instance. I have this in kilowatt hours consumption here. Layton Park Dairy required 63.25 kilowatt hours for pasteurization based on 24,000 pounds of milk, 5 gallons of pasteurized cream, and 14,000 pounds of pasteurized skim milk.

Q. And what did it require for holding and keeping the milk cold?

A. Holding required 139 kilowatt hours.

Q. That was the Layton Park Dairy?

A. That was Layton Park Dairy, yes.

Q. Will you state the number of kilowatt hours consumed in each of these operations in the Golden Guernsey Dairy?

A. Golden Guernsey—we have 161 kilowatt hours for pasteurizing 82,350 pounds of pasteurized milk, 8,660 pounds of pasteurized homogenized milk, 280 gallons of pasteurized cream, and 180 gallons of pasteurized skim milk.

Q. Now, will you state how many kilowatt hours were used in the cooling for pasteurization?

A. That was for the pasteurization, yes.

[fol. 106] Q. Will you please state what that kilowatt hour consumption was?

A. 161 kilowatt.

Q. And what was the kilowatt hours consumed in the holding room?

A. That was 784.

Q. Will you tell us the amount of electrical energy that was used in the cooling as a part of pasteurization in the Emmer Brothers Dairy?

A. Emmer Brothers—cooling 10,000 pounds of pasteurized milk, 50 gallons of pasteurized cream, and 2,000 pounds of pasteurized skim milk required 38.7 kilowatt hours.

Q. And will you state how many kilowatt hours were consumed in the refrigeration of the holding room?

A. That amounted to 64.2.

Q. 64.2. Now, I believe you stated that this investigation was made on Saturday?

A. That is right.

Q. Do you recall what the temperature was on that day?

A. The temperature in the morning at the time the survey was made was about 75 degrees in the sun.

Q. Inside, you say?

A. No, in the sun.

Q. Do you consider that an average day for Milwaukee?

A. Well, we would consider that a normal average day, maybe a slightly low average day, but I would consider it about an average day, yes.

Q. On colder days during the year is more or less electrical energy used for refrigeration?

A. You require considerably less refrigeration during the winter months.

Q. Why would that be?

A. It may drop as low as 35 to 40 per cent of the total, depending upon the type of pasteurizing cooler they have and also the arrangement of the rooms in so far as the cold air and warm air entrances are concerned.

Q. Is the equipment that is present in those three dairies similar to the type of equipment that is used in other dairies that you have observed in Milwaukee?

A. Yes, I would say it is with the exception of some, probably, having some of the later types of pasteurized cooler, I should say pasteurized milk cooler.

[fol. 107] Q. Do these pasteurized milk coolers, these more modern ones, consume less electricity?

A. I wouldn't say they consume less electricity. They are so designed that they probably can get a better heat transfer and use various types—or temperatures of water that may not be available with another type or the con-

ventional type of pasteurized milk cooler, which consist of tubular coils.

Q. Is water used extensively in the cooling of milk in Milwaukee by dairies?

A. Yes; you use water up to such a stage where you have to use a refrigerant to get your final temperature.

Q. Approximately how low has the water in Milwaukee been able to bring the pasteurized milk before mechanical refrigeration occurs?

A. Well, it is usually about two to three degrees above the water temperature.

Q. And how low is the water temperature in winter?

A. In winter it has gone down as low as 38 degrees.

Q. And what is the maximum in the summer?

A. The maximum for various seasons has reached 67, except the last two years it has been rather cool and it has probably not reached a maximum of more than 60 degrees.

Mr. Miller: That is all.

The Court: Cross-examine.

Cross-examination.

By Mr. Wake:

Q. Are you a graduate engineer?

A. No. I have had 35 years of experience, and I have taken—done some studying at the University Extension.

Q. So that you are testifying generally as a practical man and as an estimator; is that right?

A. That is right, with the knowledge of refrigeration.

Q. When the statement was made, if it was made, that an average normal day for Milwaukee is 75 degrees Fahrenheit, did that mean normal for September 21?

A. No. I would consider that—well, you cannot consider it as a mean average because a mean average in Milwaukee is about 71 degrees.

Q. The mean average of Milwaukee is 71?

A. I mean maximum mean.

Q. Oh, maximum mean?

A. That is right.

[fol. 108] Q. What is the mean average of Milwaukee, if you know?

A. Well, I believe I can figure that—give you that information.

Q. It is in the record here. I just want to know—

A. That is all right. I have it here, also. I was assuming a 75 day would be what we would consider an average day.

Q. An average day for that time of the year?

A. It could be for that time of the day. If you consider the mean average it would be a little high, yes.

Q. The point I am making is, the term "normal day" doesn't mean throughout the year?

A. That is right.

Q. The question was asked of you if you designed and you said in response "we". You actually have not designed any equipment yourself, have you?

A. In the employ of the concern I work for, yes.

Q. Have you personally designed it?

A. Yes. I worked on the drawing board for 14 years before I did sales estimating.

Q. And on the drawing board you give execution to somebody else's idea, don't you?

A. Well, we, of course, figure out the various conditions which are to be met in order to produce or furnish the proper size equipment to do the proper amount of work.

Q. But the design of it is that of the engineers, isn't it?

A. Yes—well, as I said, I have done some drawing room work and, of course, did some designing.

Q. When you gave us the breakdown of these kilowatt hour figures, is it true that you have placed all of the refrigeration consumption in kilowatt hours except that portion which went directly into the cooling coils interspersed in the vats or in conjunction directly with the vats; have you placed all else in the method of excluding it from pasteurization?

A. Well, in the holding it was the amount of cooling that had to be done within a given time from one temperature to the other temperature without any motor heat of pumps and pumping that is required to pump that to the pasteurizers.

Q. Maybe I didn't ask you a very clear question. What I mean is, have you taken, on the one hand, only that portion of the refrigerant energy that is in the coils of the vats [fol. 109] themselves or the next step removed from the vats and taken all of the other refrigerant and put it into a separate group?

A. I put each one in a separate group, the pasteurized milk, the homogenized pasteurized milk, the cream and the skim milk.

Q. What about the holding tanks?

A. That is a separate item, also. That goes in with—has been figured in with the holding room.

Q. That has been figured with the holding room?

A. That is right.

Q. Who told you to do that, Mr. Heil?

A. I was told to separate pasteurization refrigeration from holding room refrigeration.

Q. And you don't claim to know what pasteurization is strictly as a process, do you?

A. Not in so far as the chemical reactions which will take place or the biological effects or anything like that.

Q. Well, on the holding tanks who told you to categorically place those with the refrigeration room as distinguished from any portion of the pasteurizer?

A. I was requested by Mr. Miller to do that.

Q. You had no preconceived notion of that before you derived the figures you mentioned, did you?

A. No.

Q. Now, in the case of Layton Park Dairy—

A. Yes.

Q. —can you furnish an estimate of the connected load assignable to that portion of refrigeration used directly in the pasteurizing milk as it comes out of the vats?

A. No, I can't do that. I base my load upon the number of ton hours of refrigeration required to cool that milk from 60 degrees to 45 degrees Fahrenheit—or 40 degrees Fahrenheit.

Q. On that particular day?

A. That is right.

Q. You didn't consider the connected load of that particular demand at all?

A. No, because that load, based on the rated horse power of the motor, may vary.

Q. As a matter of fact, the connected load necessary for that portion of the refrigeration is greatly in excess of that portion of the connected load used to service the cooling room, isn't it?

[fol. 110] A. The cooling room refrigerating load is greater than the pasteurization cooling load is.

Q. You are talking about the consumption?

A. That is holding room consumption, yes.

Q. I am asking you about the connected load capacity.

A. Well, the connected load capacity is always greater than the actual load because of the fact that we usually allow a factor of safety for the motors operating those machines.

Q. I am asking you to direct your attention, for the moment, to the connected load capacity of that type of refrigerant process directly after the pasteurizing vats as compared to the connected load capacity used to service the cooling room.

A. In other words, you mean the separation between the two?

Q. That is right.

A. Yes. Well, as I said, pasteurization based on the temperature of water available for the initial cooling results in less refrigerating or kilowatt hour requirements than the holding rooms do.

Q. But, by the same token, the connected load capacity is in much greater proportion in that portion calculated to serve—

A. I understand now what you mean.

Q. Yes.

A. In pasteurization cooling we operate the compressors with a higher suction pressure which requires less horse power per ton. Naturally, our kilowatt consumption per ton is less because our temperatures are higher in pasteurization cooling than they are in room cooling.

Q. And there is a much quicker change in the reduction of temperature from 145 to 40 after the milk comes out of the vats than there is in any other change in the Milwaukee temperature, isn't there?

A. That is correct.

Q. And that requires a high capacity refrigerant energy at that stage, doesn't it?

A. Not necessarily. It depends upon the rate of flow or the quantity of milk that is cooled on the hourly basis.

Q. I will ask you about the rated capacity of the motors. Those used to provide refrigerant for the coils next removed from the vats are at a much higher rated capacity than those used to produce refrigerant for the cooling room; isn't that the fact?

[fol. 111] A. I wouldn't say that. It depends upon how many compressors they have and the capacity of the compressors, and depending on which size machine they would operate on the holding room as compared to the pasteurization room.

Q. Did you look over the Exhibit "H" which the taxpayer and the government have stipulated to so far as Layton Park Dairy is concerned, that shows the capacity rates of those motors—rated capacity of those motors?

A. Yes, but I didn't take that into consideration in my calculations because I arrived at the ton hours required to do the cooling.

Q. Well, you didn't ignore the relationship completely, did you?

A. Well, I wouldn't say that I considered it because I was to arrive at the ton hours in order to separate the pasteurization cooling load from the room cooling load.

Q. I think we understand what you did. This is true, isn't it, that in all the dairies you know of around this county the rated capacity of the motors used for the provision of the refrigerant in the coils right out of the pasteurizer next removed from the vats are as much higher than the rated capacity of the motors utilized to supply refrigerant for the cooling room?

A. Not necessarily.

Q. Have you looked into that point at all?

A. Yes, because there may be various size machines in a plant; they may have two machines operating on one load, and they may only have one on the other, depending upon the pressures at which they operate and the cooling surface that the cooler contains.

Q. That is, there may be a split in the function of one motor or one compressor; is that what you are—

A. That is right. They try and maintain the same suction pressure or refrigerant temperature on each particular set of coolers.

Q. But there is more capacity and more output from the compressors used as a safety measure or as a backlog for the cooling following the vats than there is devoted to the cooling room; isn't that the fact?

A. Not necessarily, no. It can't be, unless you are trying to cool a greater amount of pasteurized milk than the cooler is normally designed for.

Q. You understand the difference between consumption and capacity, do you?

[fol. 112] A. Well, I can't see—in consumption, you probably allow 10 per cent for losses.

Q. Do you understand the distinction between the consumption and capacity?

A. Yes. In capacity we rate the capacity based upon the volume of ammonia that is pumped by the compressor, and in consumption we would base it upon the quantity of cooling that has to be done, plus the losses.

Q. Have you studied the electric motors themselves in terms of capacity?

A. No, I did not. The only thing I did, I allowed an 85 per cent efficiency factor for a squirrel-cage motor which all of these dairies have.

Q. Can you explain to me, from the way you have been reasoning, the difference, if there is one, between the amount of refrigerant to hold one ton of milk in a cooling room as distinguished from the amount of refrigerant required to reduce one ton of milk from a temperature of 143 degrees Fahrenheit to 40 degrees Fahrenheit?

A. Yes. You would have the quantity of milk that you would have in that particular tank through the temperature range through which you would have to cool it, plus your losses through the walls of the tank.

Q. Well, there is a much greater expenditure of energy in that process than there is merely in holding it in the cooling room, isn't there?

A. From information that I have secured or what I have been told is that the milk in the holding tanks or the cream in the holding tanks—

Q. I didn't talk about holding tanks. Holding room; cooling rooms.

A. Oh, holding rooms. Well, your losses are the biggest factor in the holding rooms due to the amount of water that goes in with the bottles and the wet cases and the air that filters in through the openings through which the conveyors go and also the outside door openings which, of course, are affected mostly when they are loading and unloading milk—or loading milk on the platform.

Q. Now, if you had a dairy that sent three-fourths of its milk to distribution stations as soon as it went into bottles as distinguished from holding it all in the holding

room or refrigerating room, would you expect a decrease in direct proportion in your refrigerating capacity?

A. Of the machine or of the requirements?

[fol. 113] Q. Of the requirements.

A. Well, I would say that if it is not held in the storage room any length of time, the requirements would be less.

Q. Well, I am putting to you a hypothetical case where three-fourths is immediately sent beyond the confines of that plant, one-fourth held as distinguished from another plant where the entire volume was held, both volumes being equal.

A. Well, in that case I would say your refrigeration losses would be less due to the fact that you wouldn't be removing the heat of the bottles and the cases in that holding room with the exception of the heat losses coming in the door through the loading operation.

Q. Would you expect the difference to be in almost direct arithmetical proportion to the removal of three-quarters of the volume in the one instance?

A. No. It may be a little bit more than the one-quarter because of the fact that that quarter, 25 per cent that remains in has the moisture in the cases, and also the bottles.

Q. In your studies, how many hours does the refrigeration for the pasteurization normally run at Layton as contrasted to the number of hours of refrigeration for the cooler room normally run?

A. That depends upon the quantity of milk that you run over the cooler per hour.

Q. What did you find it to be Saturday, please?

A. And also the number of door openings, of the temperature to which the milk or the room has risen after all of the crates and bottles have been into the room. That is hard to decide because of—the capacity of the compressor determines the number of hours which would be required for bringing the room temperature down and holding it at that temperature at which it should be held.

Q. Did you study that characteristic on Saturday?

A. No, because you would have to stay there and time the number of hours—or time the operation of the machine and the stoppage period.

The Court: Let's hurry on, Mr. Wake.

Mr. Wake:

Q. You didn't give consideration in any of the questions you attempted to answer so far as to independent water systems of any of the dairies, did you?

A. At Golden Guernsey they have a separate well which [fol. 114] produces about 54 to 56 degree water constantly throughout the year. They use that in their pasteurization cooler between the initial lake water cooling section and the final sweet water cooling section. Another thing with Golden Guernsey, I think they hold their cream and their skim milk with the well water. They claim that they maintain low enough temperatures to be able to use that well water.

Q. Now, in the use of that well water as the first element for cooling beyond the pasteurizing vats, did you put anything in your consumption for the pumping of that well water?

A. I did not.

Q. It is properly part of the pasteurization at that stage, isn't it?

A. It would be, yes. We do find that at Layton Park Dairy they hold 1500 gallons of milk, whereas at Golden Guernsey they hold 3,000 gallons of milk, and at Layton Park Dairy we have a three horse power motor operating two hours per day to produce the cooling effect for those holding tanks.

Q. Now, your figures all represent a theoretically perfect operation of the equipment; is that the way you do it?

A. I allowed 10 per cent for losses on the pasteurizing side.

Q. And you know nothing about the actual consumption or operation contrasted to the theoretical as you outline in your initial assumptions; that is correct?

A. That is correct, because that would have to be determined with instruments; especially the operating time would have to have esterline meters on them.

Mr. Wake: That is all.

Redirect examination.

By Mr. Miller:

Q. Just one question. Counsel asked you about the refrigeration used in cooling the milk from 140 degrees down

to—pasteurization—down to the temperature of 40, rather. Now, in any of the dairies you visited, was it necessary to bring down the temperature mechanically from 140 to 40?

A. Well, we used a refrigerant for the final cooling stage from that to which it was cooled by the lake water or well water.

[fol. 115] Q. Which is below 140?

A. Oh, yes. That Saturday it averaged around 60 degrees or so.

Mr. Miller: That is all.

Recross-examination.

By Mr. Wake:

Q. What temperature did you assume in your storage?

A. 37 degrees.

Mr. Wake: That is all.

(Witness excused.)

The Court: Other witnesses?

Mr. Miller: Mr. Manning.

ROBERT E. MANNING, called as a witness herein, on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Miller:

Q. Will you state your name, please?

A. Robert E. Manning.

Mr. Wake: May it please the court, I would like to see if we can clarify something that may not become important and may not be important, but the terminology is a little disturbing. If you will come up here, Mr. Miller. In all of the schedules the footnote which was put on last night, I believe, refers to asterisk—correction, the second one says—this is on all of the schedules and was put on as an explanation: "The kilowatt hours daily consumption repre-

sents the rated horse power output of each motor times the estimated hours of daily use." The exhibit itself refers to equivalent kilowatt input. The estimate is derived from the last column, which the court will see, when it comes to kilowatt hours daily consumption as a product of the two that are up there, hours times input. I don't know just how the output got in there. It wasn't, as I understand, intended to be in that form. I don't think it is going to influence anyone, except the exhibit itself doesn't seem to line up consistently. It is a little point of confusion, I believe.

The Court: What do you say?

Mr. Miller: The entire footnote was merely meant for the purpose of showing kilowatt hours daily consumption [fol. 116] isn't an actual consumption figure but is merely the consumption figure that would be used if each motor were going to its full capacity, constantly compressing.

Mr. Wake: We agree on that.

Mr. Miller: And I didn't think that that difference which counsel points out in the language was intended to mean anything other than that.

The Court: Well, as long as there is an understanding about it I think you need take no more time on it.

Mr. Miller:

Q. Mr. Manning, what is your occupation?

A. Internal Revenue Agent.

Q. How long have you been an internal revenue agent?

A. About twelve years.

Q. Have you specialized in any field in the internal revenue?

A. Yes, in miscellaneous taxes; principally tax on gasoline and oil, on electrical energy, and on manufacturers' taxes.

Q. What does your work as a revenue agent consist of?

A. Examining the different companies that pay tax to determine their correct tax liability, if tax liability has been correctly reported.

Q. To your knowledge, does the Bureau of Internal Revenue have any established or consistent practice with respect to the classification of the consumption of electrical energy by consumers engaged both in commercial operations and in manufacturing operations where they have only one electric meter?

Mr. Wake: That is objected to upon the ground that I believe that would be covered by published rulings, cumulative bulletins, for example, memoranda of counsel, any of the recognized sources of publication.

The Court: What is the purpose; to show some practice of the Bureau to be controlling?

Mr. Miller: To show the practice of the Bureau with respect to situations where a company makes, for example, both butter and pasteurizes and distributes milk.

The Court: Suppose it was the practice of the Bureau. Then what?

Mr. Miller: To show how the Commissioner of Internal Revenue arrived at the determination in the case of a dairy that sells both pasteurized milk and butter or cheese or ice cream.

[fol. 117] The Court: Well, is the taxpayer supposed to be cognizant of what the practice of the Bureau might be? Is that binding on him? Or is the purpose something else for which you offer the testimony?

Mr. Miller: Well, it isn't to bind the taxpayer but merely to show the test which has been consistently applied, so that if in argument we can determine what is the reasonable basis for determining the predominant use of the electrical energy or the predominant nature of the business we are interested in, whether or not the determination of it is correct and the manner in which it has been applied.

The Court: Objection overruled. You may go into it for what it may be worth.

Mr. Miller: I didn't understand, your honor.

The Court: The ruling is you may go into it. Objection overruled.

(Whereupon the reporter read the pending question.)

A. Where a taxpayer has both industrial and commercial activities it is our custom to use the gross receipts method in determining which is the predominant character of the business. If manufactured products produce more receipts than products that are bought and sold or jobbing items, then the predominant activity of the business is established in that manner.

Mr. Wake: I move that be stricken on the ground of the previous objection on the theory that that is not anywhere stated in the regulations, it is not within the scope of any publications of the Treasury Department; and on the fur-

ther ground that the plaintiff here, as a taxpayer, is not within the category within which the test can be applied as outlined by the witness. The taxpayer here is engaged in furnishing electrical energy.

Mr. Miller: If your honor please, the question in this case is whether or not the Commissioner of Internal Revenue adopted a reasonable method in determining the predominant use of electrical energy in this case.

The Court: I think on the basis of the previous ruling that the objection will again be overruled. You may proceed. It may be understood, so that Mr. Wake won't have to object to every question that elicits information along this line, that all such questions asked are received subject to the objection he has heretofore made and the ruling is the same.

[fol. 118] Mr. Miller:

Q. In the case of butter, cheese and ice cream, how do you apply the test you have stated?

A. We would consider that as a manufacturing activity.

Q. And how would you apply this gross receipts test you mentioned as compared with milk sold—fluid milk sold by the same dairy?

A. We would ascertain the quantity of sales of manufactured products and the amount of sales of fluid milk and whichever was larger would determine the taxability of the account.

Mr. Miller: If your honor please, may I make a short statement here and perhaps we can simplify this? Dependent upon whether or not your honor wants to hear oral argument in this case we will rest the desirability of asking Mr. Manning further questions. The stipulation is rather lengthy and can be summarized in briefs if no oral argument is heard.

The Court: I don't think I am going to ask for oral argument. I think I am going to ask you to submit it on briefs and you can then point out to me the important parts of the stipulation, and so forth, and I think it will save me time. I have been trying to get out a couple of other opinions and I have been going back piecemeal. I don't know how good they are going to be.

Mr. Miller: I won't ask any further questions.

The Court: Cross-examine, Mr. Wake.

Cross-examination.

By Mr. Wake:

Q. The butter, cheese and ice cream mentioned—is that covered by official ruling, published ruling of any kind?

A. It is what they term an informal ruling.

Q. An informal ruling at times is given publication, isn't it?

A. That is right.

Q. Are those the subjects of publication?

A. Yes, I think they are.

Q. Now, when you speak of the gross receipts test and use fluid milk precisely, you assume that in that thinking so far as you are doing the approach to the matter, that regardless of what took place in the pasteurizing vats that entire commodity or product is, nevertheless, still a product [fol. 119] similar to what it would be were it to be sold as raw milk?

A. That is right.

Q. Well, that reasoning is directly in opposition, then, to the Colorado case in 143 Fed. 2d 79, isn't it?

A. That I am not familiar with the numbers that you quote there.

Q. I mean the so-called Colorado Public Service Company case in which the Commissioner failed to acquiesce.

A. That is right.

Q. The fluid milk sales are always, in any case that you have encountered, much higher in any measurement than the manufactured items of a dairy, isn't it, either gross receipts test or—

A. Do you mean the particular dairies involved in this case?

Q. Well, yes, let's take them in this case, perhaps. That is more pertinent.

A. That may be true of all but two. I think there is two in this that have more.

Q. It is generally true in the dairy industry, isn't it, that fluid milk, especially in the large plants which have pasteurizers, is the larger part of the percentage of gross sales than any of the so-called manufactured items, including butter and cheese?

A. I couldn't testify exactly on that.

Q. In preparing items for market such as, for example,

fruit—and Witness Professor Mortenson mentioned that in passing—the department has ruled, has it not, that any energy which might be expended in the preparation of that type is, in effect, exempt under the theory that it is preparing for market rather than commercial in nature?

A. No, that is not right.

Q. The canning of vegetables, bringing them to a requisite degree of temperature and inserting them in hermetically sealed cans, either with or without sweetening, as the case may be, constitutes an enterprise which is, under the rulings, an exempt situation?

A. I believe there is a ruling that some types of canning are considered industrial.

Q. Taking a bottling works involving taking concentrated product, adding water to it in appropriate solution, and selling it as a bottled commodity—that has been ruled to be an exempt classification?

[fol. 120] Mr. Miller: If your honor please, I object to that. The only purpose this witness was put on for was to state what the Commissioner's position was.

The Court: I suppose he is going into the question of whether it is a reasonable approach, whether the Commissioner adopted a reasonable interpretation in one industry and not in this. I imagine that is why he is asking.

Mr. Miller: If your honor please, that would be a matter of argument whether it is reasonable or not.

The Court: Objection overruled. Confine yourself to it because I can't see it has a great deal of weight.

Mr. Wake:

Q. Do you know that the frozen food industry is exempt from the tax because of a ruling by the Commissioner?

A. I haven't seen that ruling.

Mr. Wake: I think that is all.

(Witness excused.)

The Court: Next witness.

Mr. Miller: I have nothing further.

The Court: Defendant rests.

Mr. Wake: No rebuttal, your honor.

The Court: I am going to let you submit this on brief because not having seen the stipulation it would be almost

a waste of time to do otherwise. Can you have your brief in by 20 days, Mr. Wake?

Mr. Wake: I am almost positive I can do it in that period.

The Court: You may have 20 days to file your brief and the defendant may have 30 days to reply. In the event you desire a reply brief covering points not touched in your main brief, the plaintiff may have 5 days thereafter to make reply.

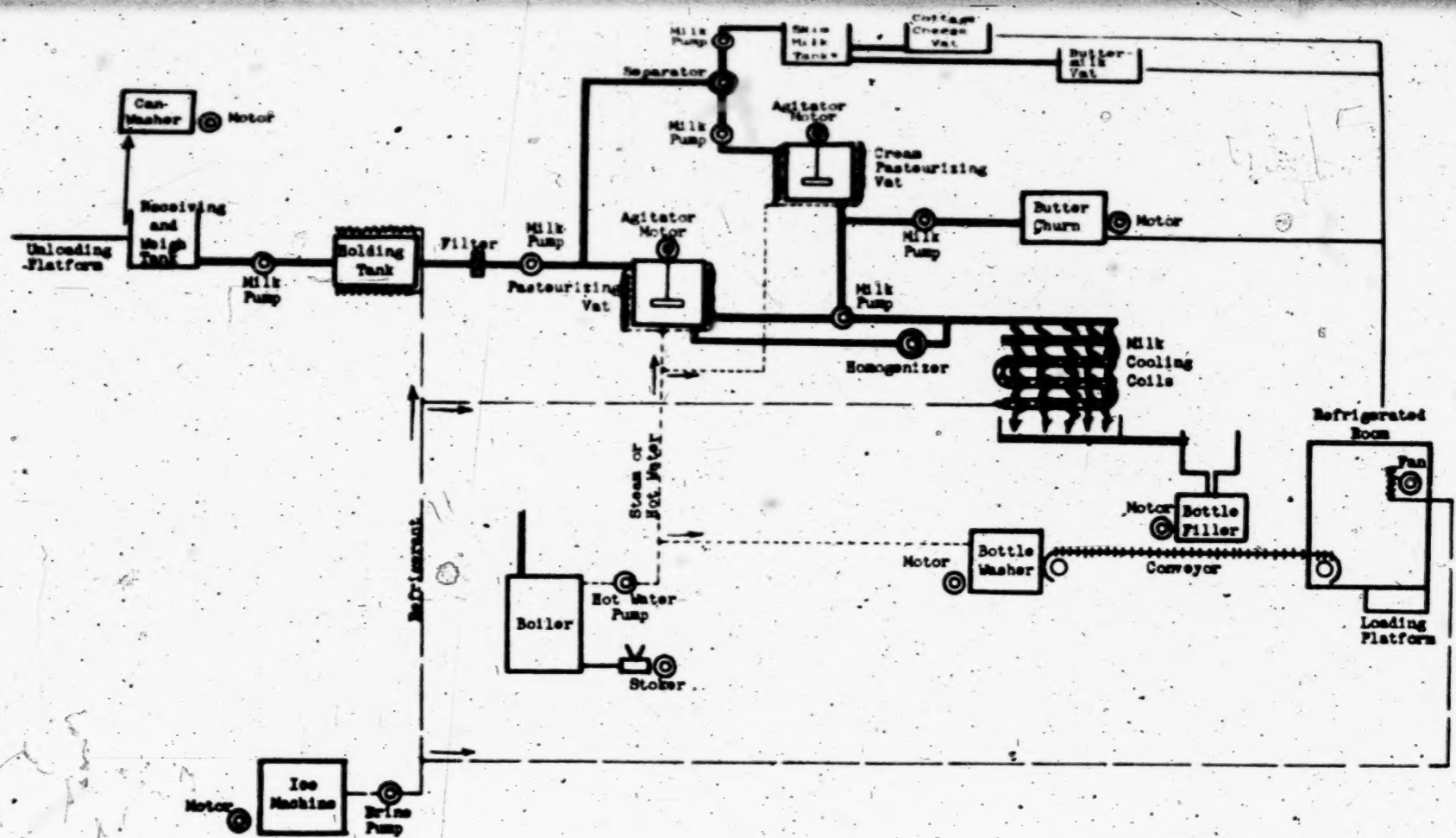
Mr. Wake: Thank you, your honor.

The Court: Court will be in recess. The parties will retain their exhibits but make them available to the other party in the event they need them for preparing a brief.

(Which were all the proceedings had and testimony taken in the above entitled matter at said time.)

[fols. 121-122] Reporter's Certificate to foregoing transcript omitted in printing.

(Here follows 1 Photolithograph, side folio 123)



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PLAINTIFF'S EXHIBIT 1.

SCHEMATIC DIAGRAM OF A DAIRY PLANT LAYOUT

NOTE: One milk pump may perform one or more of the above-indicated pumping operations if portable milk pumps are used or if suitable piping connections are installed.

- Skim milk is also pasteurized; either in the skim milk tank or in one of the other pasteurizing vats.

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[fols. 124-125] DEFENDANT'S EXHIBIT "A"

U. S. Treasury Department
Public Health Service

Public Health Bulletin No. 245

December 1938

Milk Supplies and Their Control in American Urban
Communities of Over 1,000 Population in 1936

By

A. W. Fuchs, Senior Sanitary Engineer

and

L. C. Frank, Senior Sanitary Engineer

From the Division of Public Health Methods
National Institute of Health

Prepared by Direction of the Surgeon General

United States Government Printing Office

Washington : 1939

For sale by the Superintendent of Documents, Washington,
D. C. Price 10 cents

[fol. 126] Production and Consumption of Fluid Market
Milk. Number of Dairy Farms and Plants

The number of raw-milk distributors, pasteurization
plants, and producing farms per 1,000 population in 1936
is shown in table 3.

Table 3.—Number of raw-milk distributors, pasteurization
plants, and producing farms per 1,000 population in
1936

By population groups

Population group	Number per 1,000 population		
	Raw-milk distributors	Pasteurization plants	Producing farms
1,000-2,499	2.9	0.26	1.5
2,500-4,999	1.9	.29	2.2
5,000-9,999	1.7	.28	3.7
10,000-24,999	1.1	.21	2.9
25,000-99,999	.6	.20	5.9
100,000-499,999	.4	.14	7.2
500,000 and over	.1	.07	7.5
Unweighted mean for cities reporting	2.0	.26	2.6
Number of cities reporting	2,286	2,372	1,941
Weighted mean for United States ¹	.8	.17	5.5

¹ The weighted mean represents the average for the entire population of all municipalities of over 1,000 population in the United States. It was computed as follows: (1) Multiply the number of raw-milk distributors (or pasteurization plants, or producing farms) per 1,000 population in each population group by the total population in that group in the United States; (2) total these products for all population groups; and (3) divide by the total population of all municipalities of over 1,000 population in the United States.

All other means and rates in this table, including those for each population group and each geographic division, are unweighted.

[fo]. 127]

By geographic divisions

Number per 1,000 population

Geographic division	Number per 1,000 population		
	Raw-milk distributors	Pasteurization plants	Producing farms
New England	2.9	0.29	5.5
Middle Atlantic	1.2	.31	6.6
East North Central	1.9	.37	3.8
West North Central	3.3	.19	1.4
South Atlantic	1.8	.13	1.5
East South Central	1.4	.10	.8
West South Central	1.5	.09	.9
Mountain	2.3	.23	1.3
Pacific	1.4	.34	1.1

The weighted mean number of raw-milk distributors for all cities of over 1,000 population in the United States was 0.8 per 1,000 population, or one for every 1,250 persons. The unweighted mean for the 2,286 municipalities reporting on this item was 2 per 1,000 population. The number of raw-milk distributors per 1,000 population varied inversely with the size of city, ranging from a mean of 2.9 in the 1,000-2,499 population group to 0.1 in cities of over 500,000. The West North Central division had over 3 per 1,000 population, the New England and the Mountain States between 2 and 3, and all other divisions less than 2. The differences, both by population groups and geographic divisions, are largely a reflection of the variation in the percentage of raw milk sold. In individual cities the number of raw-milk distributors per 1,000 population ranged from 0 to 20, but was under 2 in nearly two-thirds of the municipalities.

The weighted mean number of pasteurization plants was 0.17 per 1,000 population, or 1 for every 6,000 persons. The mean for the 2,372 cities reporting on this item was 0.26 per 1,000 population. The number of pasteurization plants per 1,000 population varied inversely with the size of city, ranging from a mean of 0.29 in the 2,500-4,999 population group to only 0.07 in the cities of over 500,000. This unexpected result is due to the fact that, while the percentage pasteurization in the largest cities was 4 times as high as in the smallest, the volume handled per pasteurization plant was 18 times as large. Geographically the mean va-

[fol. 128] ried from 0.09 per 1,000 persons in the West South Central States to 0.37 in the East North Central division. In the latter the percentage pasteurization was twice as high and the plants were twice as large as in the former. In individual municipalities the number of pasteurization plants per 1,000 population ranged from 0 to 4, but was under 0.3 in over two-thirds of the cities.

The weighted mean number of producing farms selling milk to pasteurization plants was 5.5 per 1,000 population, or 1 for every 180 persons. For the 1,941 cities reporting on this item the mean was 2.6 per 1,000 population. The group mean increased from 1.5 for the smallest cities to 7.5 for the largest. Geographically it was lowest in the East South Central division and highest in the Middle Atlantic. In both instances these variations parallel the trend of percentage pasteurization. For individual cities the number of producing farms per 1,000 population ranged from 0 to 128, but was less than one in two-thirds of the municipalities reporting.

Since 1923 the number of dairy farms producing milk to be consumed either raw or pasteurized, per 1,000 population, has decreased slightly for cities of over 500,000, but has increased slightly for cities between 70,000 and 500,000. The number of distributors (total of raw and pasteurized milk) per 1,000 population has increased slightly in these population groups.

[fol. 129] Table 11.—Amount of high-grade pasteurized milk sold¹

¹ Includes such designations as grade A pasteurized, select pasteurized, inspected pasteurized, guaranteed pasteurized, special pasteurized, and similar grades, but not certified pasteurized which is discussed elsewhere.

By population groups

Percent
of total
supply

Population group

1,000-2,499	8.0
2,500-4,999	17.8
5,000-9,999	23.3
10,000-24,999	29.9
25,000-99,999	36.0
100,000-499,999	38.6
500,000 and over	40.0
Mean 2,277 cities	18.1
Weighted mean for United States ²	33.35

By geographic divisions

Percent
of total
supply

Geographic division

New England	6.6
Middle Atlantic	35.0
East North Central	11.3
West North Central	8.0
South Atlantic	17.8
East South Central	20.7
West South Central	25.8
Mountain	11.1
Pacific	45.5

² Computed by same method as in table 9. All other means are unweighted.

Frequency distribution

Municipalities		
Percentage of total supply	Number	Percent
0	1,388	60.9
1-9	111	4.9
10-19	106	4.7
20-29	130	5.7
30-39	64	2.8
40-49	80	3.5
50-59	92	4.0
60-69	80	3.5
70-79	72	3.2
80-89	40	1.8
90-100	114	5.0
Total	2,277	100.0

One-third of the total milk volume of all cities of over 1,000 population was sold as one of these high grades of pasteurized. For the 2,277 municipalities reporting, the unweighted mean was 18.1 percent. The mean increased uniformly with size of city, from a low of 8 percent in the smallest towns to a high of 40 percent in the largest cities. It was lowest in New England and highest in the Pacific States. High-grade pasteurized was available in less than 40 percent of the municipalities reporting, and its proportion of the total supply in these ranged from 1 to 100 percent. High-grade pasteurized constituted 45 percent of the total pasteurized milk sold.

Vitamin D pasteurized milk (other than certified) was reported sold in 15 cities, but this figure is probably far from complete.

Of the total milk supply sold in communities of over 1,000 population in the United States, 40 percent was ungraded pasteurized or low-grade pasteurized. The unweighted mean for the 2,279 municipalities reporting was 23 percent. The mean increased uniformly with size of city, from a minimum of 16.2 percent in the smallest municipalities to a maximum of 55.0 percent in the largest. The means were highest in the Northeast and lowest in the South and on the Pacific coast. Low grades of pasteurized milk were sold in less than 40 percent of the municipalities.

in which the amounts sold ranged from 1 to 100 percent of the total supply.

[fol. 131] Amount and Price of High-Grade Raw Milk

The percentage of the total milk supply sold as high-grade raw milk is given in table 15, and the price is shown in table 16. "High-grade raw" includes such designations as grade A raw, select raw, baby raw, inspected raw, guaranteed raw, special raw, and similar grades, but not certified raw, which has already been discussed.

Table 15.—Amount of high-grade raw milk sold.¹

By population groups

Population group	Percent of total supply
1,000-2,499	13.6
2,500-4,999	23.0
5,000-9,999	28.1
10,000-24,999	26.2
25,000-99,999	21.0
100,000-499,999	10.5
500,000 and over	3.5
Mean, 2,285 cities	19.7
Weighted mean for United States ²	14.44

¹ Includes such designations as grade A raw, select raw, baby raw, inspected raw, guaranteed raw, special raw, and similar grades, but not certified raw which is discussed elsewhere.

² Computed by same method as in table 9. All other means in this table are unweighted.

By geographic divisions

Geographic division	Percent of total supply
New England	3.5
Middle Atlantic	24.1
East North Central	4.0
West North Central	8.9
South Atlantic	30.1
East South Central	51.7
West South Central	52.5
Mountain	18.0
Pacific	37.1

[fol. 132]

Frequency distribution

Percent of total supply	Municipalities	
	Number	Percent
0	1,433	62.7
1-9	120	5.2
10-19	60	2.6
20-29	70	3.1
30-39	83	3.6
40-49	71	3.1
50-59	84	3.7
60-69	54	2.4
70-79	69	3.0
80-89	52	2.3
90-100	189	8.3
Total	2,285	100.0

Of the total milk volume sold in cities of over 1,000 population, 14.4 percent was high-grade raw. The unweighted mean for the 2,285 municipalities reporting was 19.7 percent. The mean did not vary regularly with size of city, but was high in the intermediate groups and low in the smallest and in the largest cities. Geographically the mean was lowest in New England and highest in the South. High grades of raw milk were available in less than 40 percent of the municipalities, and in these the amounts sold ranged from 1 to 100 per cent of the total supply. High-grade raw milk constituted 53 percent of all raw milk sold.

Amount and price of Ungraded and Lower Grades of Raw Milk

The percentage of the total milk supply sold as lower grades of raw or as ungraded raw is shown in table 17, and the price is given in table 18. These include such designated grades as grade B raw, grade C raw, grade D raw, market raw, family raw, ungraded raw, and similar grades, as well as raw milk for which no grade was designated.

[fol. 133] Table 17.—Amount of lower grades of raw milk sold ¹

By population groups

Population group	Percent of total supply
1,000-2,499	60.2
2,500-4,999	36.9
5,000-9,999	24.0
10,000-24,999	17.3
25,000-99,999	7.8
100,000-499,999	5.4
500,000 and over	0
Mean, 2,285 cities	39.0
Weighted mean for United States ²	12.12

¹ Includes such designated grades as grade B raw, grade C raw, grade D raw, market raw, family raw, and similar grades, as well as ungraded raw or raw milk for which no grade was designated.

² Computed by same method as in table 9. All other means are unweighted.

By geographic divisions

Geographic division	Percent of total supply
New England	47.4
Middle Atlantic	6.2
East North Central	43.0
West North Central	67.3
South Atlantic	43.5
East South Central	21.1
West South Central	19.0
Mountain	55.3
Pacific	12.2

[fol. 134]

Frequency distribution

Percent of total supply	Municipalities	
	Number	Percent
0	875	38.3
1-9	117	5.1
10-19	100	4.4
20-29	141	6.2
30-39	74	3.2
40-49	71	3.1
50-59	105	4.6
60-69	75	3.3
70-79	71	3.1
80-89	65	2.8
90-100	591	25.9
Total	2,285	100.0

Of the total milk supply sold in municipalities of over 1,000 population in the United States 12 percent was ungraded raw or low-grade raw. The unweighted mean for the 2,285 cities reporting was 39 percent. The mean strikingly varied inversely with size of city, from 60.2 percent in the smallest municipalities to 0 percent in the largest. Geographically there was a considerable, but irregular variation. The high percentages for the two North Central divisions reflect the relatively large proportion of ungraded raw milk. Ungraded or low-grade raw milk was sold in over 60 percent of the municipalities reporting, and in one-

fourth of all cities it constituted over 90 percent of the supply.

[fol. 135]

Summary

Table 19 presents a comparative summary of the various grades of milk discussed, with the number of municipalities in which they were available, the weighted mean percentage of the total supply of all United States municipalities of over 1,000 population which each grade constituted, and the mean price of each.

Table 19.—Summary of amounts and prices of the various grades of milk sold.

Classification of milk	Municipalities		Weighted mean percent of total supply	Unweighted mean price, cents per quart
	Number in which sold	Percent of those reporting		
Certified pasteurized	32	1.4	0.02	20.4
Other high grade pasteurized	889	39.1	33.35	12.4
Ungraded and lower grade pasteurized	874	38.3	40.16	10.7
Total pasteurized			¹ 73.53	
Certified raw	276	11.8	.46	18.0
Other high grade raw	852	37.3	14.44	12.0
Ungraded and lower grade raw	1,410	61.7	12.12	9.8
Total raw			27.02	
Total			¹ 100.55	

¹ This figure fails to agree by about 1 percent with the percentage of the total supply protected by pasteurization (74.7), to be discussed later, because some cities failed to report the data in both cases.

² The excess over 100 percent is due to the fact that some cities failed to report the data on all grades of milk sold.

[fol. 136] Extent of Pasteurization, Tuberculin Testing, and Abortion Testing

Extent of Pasteurization

In 1936, 74.7 percent of the total milk supply of all municipalities of over 1,000 population in the United States was protected by pasteurization (table 20). For all municipalities between 1,000 and 10,000 population in the country the weighted mean was 39.3 percent; for all cities over 10,000 it was 83.1 percent.

Table 20.—Percent of total supply protected by pasteurization

By population groups

Population group	Number of cities reporting	Percent pasteurized
1,000-2,499	945	24.5
2,500-4,999	470	41.1
5,000-9,999	351	49.4
10,000-24,999	281	58.2
25,000-99,999	169	72.6
100,000-499,999	65	85.9
500,000 and over	10	97.5
Unweighted mean	2,291	41.5
Weighted means: ¹		
Over 1,000	—	44.7
1,000 to 10,000	—	39.3
Over 10,000	—	83.1

¹ The weighted mean for all municipalities of over 1,000 population in the United States was computed as follows: (1) Multiply the percentage pasteurized in each population group by the total United States population in that group and by the per capita consumption in that group; (2) total these products for all groups; (3) multiply the total United States population in each group by the per capita consumption in that group; (4) total these products for all groups; and (5) divide (2) by (4).

The weighted mean for all municipalities of 1,000 to 10,000 population in the United States and that for all municipalities of over 10,000 were computed in the same manner, but only the respective population groups were included.

All other means in this table, including those for each population group and each geographic division, are unweighted.

[fol. 137]

By geographic divisions.

Geographic division	Percent pasteurized
New England	50.4
Middle Atlantic	70.0
East North Central	54.2
West North Central	23.3
South Atlantic	25.3
East South Central	27.0
West South Central	28.1
Mountain	26.7
Pacific	51.3

Frequency distribution

Percent pasteurized	Municipalities	
	Number	Percent
0	742	32.4
0.1-9	58	2.5
10-19	109	4.8
20-29	140	6.1
30-39	105	4.6
40-49	108	4.7
50-59	206	9.0
60-69	153	6.7
70-79	168	7.3
80-89	108	4.7
90-99.9	259	11.3
100	135	5.9
Total	2,291	100.0

For the 2,291 communities reporting, the unweighted average was 41.5 percent. As was to be expected, the percentage pasteurization increased with size of city, from a low of 24.5 in the smallest municipalities to a high of 97.5 in the largest. In the three Northeastern divisions and the Pacific States the average city had over half of its supply pasteurized, but only about one-fourth was pasteurized in [fol. 138] the average city in the other five divisions. Pasteurization was most extensive in the Middle Atlantic States, and least extensive in the West North Central division.

No pasteurized milk was consumed in nearly one-third of the municipalities, but these were all under 25,000 population. In the remaining two-thirds the percentage varied from less than 1 up to 100 percent of the supply. However, pasteurized milk was available in over 98 percent of the cities of over 10,000 population.

All market milk was pasteurized in 135, or 5.9 percent, of the municipalities reporting, distributed in all population groups; but in only 65 of these was pasteurization of all milk required by city ordinance (table 21). There were 44 cities of over 10,000 population reporting 100 percent pasteurization in 1936, as compared to 35 in 1931.

Table 22.—41 municipalities reporting that all market milk except certified was pasteurized in 1936

(List not complete, as it includes only those municipalities which responded to 1936 questionnaire survey of milk control in United States municipalities of over 1,000 population. The 1930 population is given for each municipality.)

*=Cities in which pasteurization of all market milk except certified was required by city ordinance (36 cities). The other 5 cities reported that all market milk except certified was pasteurized in 1936, even though this was not required by ordinance.

Wisconsin:

* Milwaukee	578,249
* Racine	67,542
* West Milwaukee	4,168
* Whitefish Bay	5,362

For all municipalities of over 1,000 population in the United States, the weighted mean percentage pasteurization of 74.7 in 1936 compares with a weighted mean of 68.6 percent for 1924, or an increase of 6.1 points in 12 years. It was also possible to compute weighted means for all cities of over 10,000 population in the United States for a number of years, as follows: In 1924, 78.1 percent; in 1927, 78.6 percent; in 1931, 83.8 percent; and in 1936 a slight drop to 83.1 percent (table 23).

Table 23.—Comparison of percentage pasteurization for various years in the different population groups.

Population group	1923 ¹		1924 ²		1927 ³		1929-30 ⁴		1931 ⁵		1936 ⁶	
	Number of cities reporting	Percent pasteurized	Number of cities reporting	Percent pasteurized	Number of cities reporting	Percent pasteurized	Number of cities reporting	Percent pasteurized	Number of cities reporting	Percent pasteurized	Number of cities reporting	Percent pasteurized
1,000-10,000.....	..	..	73	33.6	..	..	226	30.2	..	..	1,766	39.3
10,000-25,000.....	..	..	105	42.5	128	43.7	..	..	213	58.6	281	58.2
25,000-100,000.....	..	..	104	66.8	136	67.9	..	..	187	74.9	169	72.6
100,000-500,000.....	55	80.6	37	81.7	51	82.0	..	..	71	87.2	65	85.9
Over 500,000.....	12	97.1	9	98.1	8	98.2	..	..	13	97.9	10	97.5
Weighted means for United States: ⁶												
Over 1,000.....	..	..	..	68.6	..	..	..	..	..	..	..	74.7
Over 10,000.....	..	..	..	78.1	..	78.6	..	..	..	83.8	..	83.1

¹ Public Health Bulletin No. 164 (1926), p. 413.

² Report of Committee on Milk Production and Control, White House Conference on Child Health and Protection. The Century Co., New York, 1932, p. 277.

³ Frank, L. C., and Moss, F. J. "Extent of Pasteurization and Tuberculin Testing in American Cities of 10,000 Population and Over in 1927 and 1931." Mimeographed publication, U. S. Public Health Service, 1933.

⁴ Same as footnote 2 above, pp. 38, 39.

⁵ From table 20.

⁶ Computed by weighting the percent pasteurized in each population group by the total United States population in that group. Per capita consumption for each group was not used in weighting the 1924, 1927, and 1931 figures because it was unknown, but this factor affects only slightly the accuracy of the weighted mean.

⁷ Weighted by both population and per capita consumption (from table 20). All means for individual population groups are unweighted.

[fol. 140] State Requirements on Pasteurization, Tuberculin Testing, and Abortion Testing

None of the State laws or regulations made mandatory the pasteurization of all milk, or even of all milk except certified.

Table 35.—Frequency of certain State requirements relative to pasteurization, tuberculin testing, and abortion testing

Item	Number of States	Required by Percent of the 43 States reporting
Pasteurization of all milk	0	0
Pasteurization of all except certified milk	0	0
Tuberculin testing of herds for all milk	23	53
Tuberculin testing of herds for milk consumed raw only	2	5
Abortion testing of herds for all milk	3	7
Abortion testing of herds for milk consumed raw only	1	2
Abortion testing of herds for grade A raw milk only	8	19

IN THE DISTRICT COURT OF THE UNITED STATES

(Caption—1680)

OPINION—Filed December 31, 1946

This action is brought to recover excise taxes paid on the sale of electrical energy by plaintiff under the provisions of Section 3411 of the Internal Revenue Code. The period involved is from April 1, 1940, to July 1, 1943, during which [fol. 141] time plaintiff sold electrical energy to various dairy customers engaged, among other things, in pasteurization of milk and functions normally incident to such pasteurization.

The dairies to which plaintiff sold electrical energy, with one exception, carried on their business substantially as follows: They took orders for the delivery of fresh milk

primarily to homes, but to some extent to hotels, restaurants and retail stores; they made contracts with farmers to purchase milk produced on their respective farms; in some instances the farmers delivered the milk to the dairies, but in other instances trucks and drivers furnished by the dairies were used for such hauling purposes; after the milk was received at the dairies, it was unloaded, weighed, tested, pasteurized and then placed in bottles and stored for a short period of time under refrigeration; the dairies later delivered the milk, on definite routes, to individual consumers and regular customers, daily or on alternate days, each dairy maintaining a fleet of trucks and wagons and drivers for this purpose. A few of the dairies did manufacture some cheese and butter, but with the exception of the Fabst Farm, their predominant sale was of fluid milk.

The material portion of the statute in question reads as follows:

“Section 3411(a). There shall be imposed upon electrical energy sold for domestic or commercial consumption and not for resale a tax equivalent to 3 per centum of the price for which so sold, to be paid by the vendor under such rules and regulations as the Commissioner, with the approval of the Secretary, shall prescribe.

In accordance with the interpretation made by the Commissioner of Internal Revenue of the provisions of Section 3411(a) above quoted, the plaintiff paid taxes on electrical energy it had sold to dairies during the period involved as “electrical energy sold for domestic or commercial consumption.” The taxpayer’s claim for refund was duly considered by the commissioner and disallowed, and this action was timely commenced.

The question to be here decided is: Are the sales of electrical energy to milk dealers and distributors, who pasteurized their milk as a part of their business, sales for other than commercial consumption within the meaning of Section 3411(a) of the Internal Revenue Code? It is the contention of the commissioner that the milk dealers to which the taxpayer in this case sold the electrical energy were engaged in the commercial business of distributing daily supplies of fresh unspoiled milk from farms to urban homes and places of business, and that the process of

pasteurization was but an incident thereto. He reasons, therefore, that such energy was for commercial consumption. The taxpayer contends that pasteurization constitutes a processing of milk, and that a large part of the electrical energy supplied to the dairies is used in such pasteurization; that such is not a commercial use of energy; and therefore the sale of electrical energy for that use is not a sale for commercial consumption.

Pasteurization of milk is accomplished by means of machinery and equipment specifically designed for that purpose, permitting milk to be raised to a temperature between 143° F. and 145° F. and maintained at such temperature for a period of about 30 minutes, and then to be subjected to sudden cooling to a point between 38° F. and 40° F. Precise timing and temperature controls are important and the treatment of the milk requires consecutive co-ordinated steps. The purpose of pasteurization is to kill pathogenic bacteria in the milk while staying within such tolerances as not to destroy the natural creaming properties of milk nor impart a scorched taste to it.

To permit the proper prompt cooling of the milk, the cooling equipment in pasteurization plants necessarily is of greater capacity than if cooling were to be merely from the temperature of the milk upon its receipt at the plant to a proper holding temperature. Electrical energy is used both directly and indirectly to further the heating and cooling steps in the pasteurization process used in dairy plants. It is used to agitate the milk, to pump milk to and from the pasteurizing vats, to pump hot water, and to pump refrigerants. Uses of electrical energy which indirectly assist in the pasteurization process are electrical consumption for plant lighting, for boiler feed pumps and for the operation of tools and cleaning devices.

For nearly a century the distribution of milk has existed in the United States as a distinct form of business. Pasteurization of milk on a substantial scale was not established in this country until 1897. It came into use in Milwaukee in 1903, and by 1915 it was quite common practice. But even at the present time there are more raw milk plants in the United States than those which pasteurize their milk. [fol. 143] In the cities of over 1,000 population in the United States, a majority of the milk dairies distribute unpasteurized milk; more than 25% of all milk sold in such cities

is not pasteurized. Two experts testified at the trial they had never heard of a dairy plant which pasteurized and bottled its milk which was not a distributor.

The taxpayer furnished 15 of the 28 dairies with which we are here concerned with more than one electric meter; however, they were not so connected with the load as to differentiate between sales for commercial and non-commercial consumption. In no instance was there a separate metering of electrical energy used by a dairy in its pasteurization process. The dairies' investment in pasteurizing equipment, including increased cooling equipment, is from 15% to 20% of the total cost of its plant equipment, but this percentage figure would be considerably smaller if the investment in such items as trucks and other vehicles, horses, bottles, cases, etc., were taken into consideration. Assuming the sale price of a quart of milk in Milwaukee was 16c, the cost of the milk itself was 9.6c, the distribution in bottles about 4c and the entire plant operations about 1c. About 1/10 of a cent of the cost of plant operations is attributable to pasteurization.

While pasteurizing is an important part of the business of the dairies here involved, they likewise utilize systems of rapid regular distribution of fresh milk to their customers, and maintain fleets of trucks, horse-drawn wagons and drivers, garages, loading and unloading facilities, weighing and testing devices, storage and refrigeration rooms, and machinery for putting milk into bottles at high speed.

The government makes no effort to collect a tax on the sale of electrical energy from dairies whose predominant business is the making and selling of butter, cheese, ice cream and similar products. However, the business of the dairies here involved was and is predominantly that of fluid milk dealers and distributors.

It seems quite clear that a dairy which does not pasteurize its milk conducts a commercial business. The fact that some dairies do pasteurize their milk does not thereby change the business from commercial to industrial.

A study of the legislative history of Section 3411 of the Internal Revenue Code discloses that those who were sponsoring the legislation understood it was the nature of the consumer's business which would be controlling and not [fol. 144] the specific operation in that business to which the electrical energy might be put. Representative Crisp, one

of the conferees, stated on the floor of the House of Representatives,

"The conferees finally agreed on a 3% sales tax on commercial and domestic consumers of electrical energy."

Senator Harrison, a member of the Senate Finance Committee which favorably reported the bill, in discussing a proposed revision in 1933, said:

"I am telling the Senators nothing new when I remind them that we had a fight here in 1932 over the imposition of this tax. The Senate imposed a three per cent electric-energy tax; and it was finally adopted, to be collected from the consumer of electric energy. We applied that only on domestic and commercial energy; that is, electric energy used in stores and dwellings that are classified as commercial and domestic. There was no tax in the 1932 act imposed upon energy employed in industry."

It would unduly prolong this opinion to quote more from the legislative history, but I have examined same. Such discussions are of considerable value in ascertaining the intent of Congress. *Helvering v. Griffiths*, 318 U. S. 371; *United States v. San Francisco*, 310 U. S. 16. I am convinced it was the intent of Congress that the incidence of the tax would not depend upon the particular operation in which the energy was to be used, but upon the nature of the business of which it formed a part. The intention was to tax sales of electricity to commercial businesses, meanwhile exempting sales to industry, and not to require an analysis of the specific functions in which electricity was used in commercial businesses if such uses were incidental to that business.

Since the enactment of the electrical energy tax in the Revenue Act of 1932, the Treasury has construed the provision imposing a tax upon electrical energy for commercial consumption to mean that if the predominant character of the consumer's business is commercial, its consumption of energy is commercial. Article 40 of Treasury Regulations 42 provided:

"Where the consumer has all the electrical energy furnished through one meter, the predominant charac-

- [fol. 145] ter of the business carried on at such location shall determine the classification of electrical consumption for the purposes of this tax."

This provision remained in Regulations 42 through every revision since 1932 and was adopted with only a minor change in Regulations 46 which have been in effect since 1941. During such period various revisions of the revenue laws have been made by Congress, including several affecting the electrical energy tax.

The Treasury has never construed the statute to mean that when electrical energy is sold to a business which is predominantly commercial, it is a sale for other than commercial consumption because some portion of the energy not separately metered is used in said business in a process akin to industrial use.

Plaintiff earnestly contends, however, that until 1941 Regulations 42 contain this phrase: "The term 'electrical energy sold for domestic or commercial consumption' does not include, (1) electrical energy sold for industrial consumption, *e.g.*, for use in manufacturing, processing, mining, refining, shipbuilding, building construction, irrigation

• • • Plaintiff argues that pasteurization is a form of processing. It also sees significance in the fact the word "processing" was eliminated from the regulations in 1941.

It would be a fair method of construction to invoke the rule of *eiusdem generis*, and consider that the Treasury intended processing as therein used to be limited to certain processing engaged in by the industries of mining, refining, shipbuilding, building construction, irrigation, etc., specifically mentioned. Furthermore, shortly after the promulgation of the regulations, the Treasury issued Ruling ST 637 (XII-1 Cum. Bull. 409 (1933)), in which it held that a dairy which obtains milk and converts it into use for retail purposes is engaged in a business of commercial character and that the electrical energy used by it is subject to tax.

It is difficult to understand how the use of electricity in any activity or function could appropriately be called industrial without any reference to the business of which it is a part. Electrical energy might be used to operate an elevator, or light a building, or operate a pump, but that of itself is not sufficient to characterize the consumption of the energy as other than commercial, or industrial. Such was not the intention of Congress.

[fol. 146] The Court of Claims has held that whether a sale of electrical energy is for commercial consumption or industrial consumption must depend upon the predominant nature of the business, and not upon any particular use, at least where the entire operations are woven together and there is no separate metering for each. *St. Louis Refrigerating and Cold Storage Co. v. United States*, 43 F. Supp. 476. Although the taxpayer there manufactured and sold ice, and manufactured, sold and distributed refrigeration through pipe lines, and provided refrigeration for its warehouses located in various parts of the city of St. Louis, the court concluded that the entire business of the company was predominantly commercial rather than industrial, and therefore the electrical energy furnished to it was for commercial consumption.

In *United States v. Public Service Co. of Colorado*, 10 Cir., 143 F. (2d) 79, the court reached a conclusion opposite to the decision herein. The argument of the government that the case last above cited may be distinguished from the case at bar, because a stipulation therein stated that the dairies involved were each engaged principally in the business of pasteurizing, has considerable force, as the court did say (p. 80):

“ * * * the predominant use of electrical energy is in the pasteurization of milk or some necessary operation in connection therewith, * * * ”

However, it seems to me that that court's decision is contrary to the holding herein on the basis of the following statement in the opinion (p. 82):

“The electrical energy was not used in the commercial phase of the dairying enterprise, but in the processing or industrial phase of the enterprise.”

With due deference to the court announcing the decision in *United States v. Public Service Co. of Colorado*, *supra*, I do think that case was wrongly decided and that judgment herein must go for the defendant, dismissing the complaint to the extent it seeks return of taxes paid on sales of energy to twenty-seven milk dairies.

Dated at Milwaukee, Wisconsin, this 31st day of December, A. D. 1946.

(Signed) F. Ryan Duffy, Judge.

[fol. 147] IN THE DISTRICT COURT OF THE UNITED STATES

(Caption—1680)

Findings of Fact and Conclusions of Law.—Filed Jan. 23, 1947

This action came on to be heard on September 25, 1946, before the Court, sitting without a jury. Witnesses were sworn and testified, a stipulation of facts with attached exhibits was received, and, after both sides had rested, briefs were received and considered. And now the Court, being fully advised, enters the following

FINDINGS OF FACT

1. In this action, the plaintiff, hereinafter at times referred to as the taxpayers, is suing to recover internal revenue taxes levied and collected under the direction of the Commissioner of Internal Revenue, who purported to act under the authority of Section 3411(a) of the Internal Revenue Code. Taxpayer is a Wisconsin corporation and at all times herein mentioned was engaged in the business of supplying electrical energy to the public in the cities of Milwaukee and Racine, Wisconsin, and in territory adjacent thereto. Its principal office and place of business is in Milwaukee.
2. During the period from April 1, 1940, to July 31, 1943, the taxpayer was supplying electrical energy to certain customers engaged in the dairy business in and about Milwaukee and Racine, Wisconsin. The names of the dairies and the addresses from which their operations are directed are as disclosed in the bill of particulars which has been filed herein (and essentially is duplicated as Exhibit A to the stipulation of fact on record herein), to which reference is made.
3. Exhibit A to the stipulation also shows the number of electric service meters through which the electrical energy supplied is measured to the respective customers. Where one meter is shown, all energy consumed at the location indicated, whether for light or for power, is measured through that meter. Where two or more meters are used, the customer, in some cases, takes part of its energy under a refrigeration service rate, which is lower than regular

[fol. 148] commercial or power service rates, but which refrigeration service rate allows only use of refrigeration equipment, plus 25 per cent thereof of other incidental equipment other than lights. In other cases, two or more meters may be necessary because the customer has both single phase and three phase power equipment. The separate power meters are not so connected to the load as to enable the energy supplied for one purpose or another in the operations of the dairy plant to be differentiated.

4. The taxes paid by plaintiff in respect of the electrical energy furnished to the customers listed on Exhibit A during the period April 1, 1940, to July 31, 1943, and in a few cases into August, 1943, are shown in detail on Exhibit B attached to the stipulation, which is here incorporated by this reference. The rate of tax on and prior to June 30, 1940, was 3 per cent, and thereafter, was $3\frac{1}{3}$ per cent.

5. On May 25, 1944, the taxpayer filed a refund claim with the Collector of Internal Revenue at Milwaukee, demanding refund of all the taxes paid as shown by Exhibit B, on the ground that such sales of electrical energy had been erroneously treated in its tax return as sales for domestic and commercial consumption. Thereafter, on October 16, 1944, the Commissioner of Internal Revenue rejected and disallowed that claim for refund.

6. The record shows that one dairy listed in Exhibits A and B of the stipulation, Pabst Farms, is not engaged in fluid milk distribution. In all paragraphs of these findings, below this paragraph, it is to be understood that Pabst Farms is not included in the language used, even though such language seemingly is broad enough to include it. Pabst Farms is engaged in the business of producing, purchasing, and separating milk; also, in the manufacture and sale at wholesale of condensed skim milk and powdered skim milk. The cream separated is pasteurized and sold as butter fat to bakeries and ice cream manufacturers at Chicago. It owns a 1,300 acre farm near Oconomowoc, Wisconsin, on which is located several sets of buildings. Some of the buildings relate to the farm operations in connection with which a herd of about 200 cows is maintained. The plant, in which the operations of separating milk, pasteurizing the cream, and producing butter fat, condensed skim milk, and powdered skim milk is carried on, is located on the

same farm. In addition to handling at this plant the milk from its own herd of cows, Pabst Farms purchase milk from 210 dairy farms. The output of this plant (products made [fol. 149] from fluid milk) is sold mostly to the United States and to the bakery plants and ice cream manufacturers in the Chicago, Illinois, area, in a wholesale way.

7. The dairies listed in Exhibits A and B, which consume the electricity (except Pabst Farms, treated separately above), make contracts with farm producers at various places in Wisconsin to purchase their milk daily and at other regular intervals. In some instances the producers deliver the milk to the dairies; in others, trucks and drivers supplied by the dairies are used to bring the milk to the dairies. Except as retail or wholesale depots are maintained, or as deliveries are made to stores, each of the dairies delivers its milk and other dairy products directly to consumers by use of the horse-drawn vehicles and trucks. The consumers to whom the bulk of the products (mainly fluid milk) are delivered are regular customers, and the drivers of the vehicles, who are the employees of the dairies, in delivering the milk cover definite territories or routes each day, delivering regularly to each customer on alternate days, except where specific additional deliveries are requested by such customers. Before the war, deliveries were made daily, and sometimes even more frequently. In some instances, as noted in Exhibits D through N, attached to the stipulation, milk and other dairy products are sold and delivered by the dairies for resale, such as to restaurants, hotels, and stores.

8. For all the operations described in the preceding paragraph hereof, each dairy maintains a fleet of trucks and other vehicles, and drivers. In most cases, the drivers have standing orders to deliver specified amounts of milk each day. In other cases, the amounts are specified at the time of delivery. The drivers also collect for the milk delivered, obtaining payment from some customers in advance for the milk, from some at the time of delivery, and from some by the week.

9. For nearly a century the distribution of milk has existed in the United States as a distinct form of business. Pasteurization of milk on a substantial scale was not established in this country until 1897. It came into use in Mil-

waukee in 1903, and by 1915 it was quite common practice. But even at the present time there are more raw milk plants in the United States than those which pasteurize their milk. In the cities of over 1,000 population in the [fol. 150] United States, a majority of the milk dairies distribute unpasteurized milk; more than 25 per cent of all milk sold in such cities is not pasteurized. Two experts testified at the trial they had never heard of a dairy plant which pasteurized and bottled its milk which was not a distributor.

10. The City of Milwaukee, by ordinance, requires that milk sold in the city shall be pasteurized; and the State of Wisconsin has prescribed standards of purity in respect of milk sold within the state. Accordingly, the various dairies to which the taxpayer sells electrical energy have established "plants" where the milk is received in bulk and from which it is distributed to consumers in bottles or cans, and there the milk is pasteurized and tested or examined, in addition to being received, weighed, cooled, bottled, temporarily stored, and removed for subsequent delivery. The handling of the milk between receipt and sale involves substantially the following acts in all of the dairies (except Pabst Farms) described in Exhibits A and B, whether the milk is brought to the plant directly from the dairy's own cows (instances of this appear—Ruby, Hofmann) or from milk stations or country milk routes. If the weather is so unfavorable as to require it, the milk is cooled immediately to temperature to which it will be best kept after it has been weighed and tested for butter fat. The milk is then mixed and standardized, i. e., by adding richer or leaner milk (in butter fat content) as may be indicated. Except in the rare case where some unpasteurized milk is sold, the milk is next pasteurized.

11. Pasteurization of milk is accomplished by means of machinery and equipment specifically designed for that purpose, permitting milk to be raised to a temperature between 143° F. and 145° F. and maintained at such temperature for a period of about 30 minutes and then to be subjected to sudden cooling to a point between 38° F. and 40° F. Precise timing and temperature controls are important and the treatment of the milk requires consecutive co-ordinated steps. The purpose of pasteurization is to kill pathogenic

bacteria in the milk while staying within such tolerances as not to destroy the natural creaming properties of milk nor impart a scorched taste to it.

12. After leaving the pasteurization vats and coolers, the milk comes to tanks, from which it is drawn to be bottled, except as it is sold in cans to large users or enters into by-products. The bottles or cans have been washed, sterilized, [fol. 151] and cooled. After bottling, it is stored from several hours to a day to permit the cream line to form and to await delivery. It continues in this cold storage until sale or distribution. Such cold storage rooms are maintained at approximately 40° F.

13. All the "plants", including administrative offices, and garage space for the collecting and distributing trucks, and these are lighted. In each plant electric motors are used for some or all of the following purposes; for pumping refrigerants, for delivering milk to, through, and from the pasteurizers by pumps as necessary, for operating the homogenizer, where there is one, as shown in the exhibits, for delivering milk to the bottling machines, for operating the bottling machines, for operating cream separators, and for operating some of the machinery used in washing, sterilizing, and conveying bottles. The larger dairies differ from the smaller ones chiefly in the number of units available for different operations, such as a larger number of pasteurizing vats, more bottling machines, etc.

14. Exhibits D to I and K through N, which are attached to the stipulation on file herein, relate specifically to some one dairy involved in this case. By stipulation, because of no differentiating factor involved, all the dairies not covered by any exhibit have been agreed to be like (and controlled by) one of these exhibits, and thus details in respect of all 27 dairies are in the record. The following subjects, among others, are covered by the exhibits; the quantity of milk received by the dairy on the average during the period involved in this lawsuit; the number of motors in use during the period, showing their function; the gross receipts of the business in a typical year, and the percentages thereof applicable generally to sales, during the period involved, in respect of the various products delivered and sold to customers; the daily yield of the plant during the period covered; and the total personnel and duties assigned.

15. While pasteurizing is an important part of the business of the dairies here involved, they likewise utilize systems of rapid regular distribution of fresh milk to their customers, and maintain fleets of trucks, horse-drawn wagons and drivers, garages, loading and unloading facilities, weighing and testing devices, storage and refrigeration rooms, and machinery for putting milk into bottles at high speed. The record shows that pasteurization plays a [fol. 152] minor part in the total business of the dairies. It utilizes only a small fraction of the total personnel, causes only a minor part of the capital investments and accounts for an insignificant part of the cost of operations. The investment of the dairies in pasteurizing equipment, including increased cooling equipment, is from 15 per cent to 20 per cent of the total cost of its plant equipment, but this percentage figure would be considerably smaller if the investment in such items as trucks and other vehicles, horses, bottles, cases, et cetera, were taken into consideration. Assuming the sale price of a quart of milk in Milwaukee was 16 cents, the cost of the milk itself was 9.6 cents, the distribution in bottles about 4 cents, and the entire plant operations about 1 cent. About 1/10 of a cent of the cost of plant operations is attributable to pasteurization.

16. The predominant business of the dairies here involved (Except Pabst Farms) is, and was, that of fluid milk dealers and distributors. The electricity sold to them by plaintiff, as shown by Exhibits A and B, was sold for commercial consumption; it was sold and used in a commercial business.

17. If the parties file a stipulation, as provided in conclusion No. 1, below, it shall be taken as adopted here.

Based upon the foregoing findings of fact, the Court announced the following

CONCLUSIONS OF LAW

1. Plaintiff is entitled to a judgment against defendant for the sum shown by Exhibit B to have been sold to and consumed by Pabst Farms, i. e., for \$287.91, with interest, and with costs, according to law. (If the parties do not file a stipulation showing dates of payment by months of the sums making up the total of \$287.91, entry of judgment will be deferred to permit appropriate inquiry.)

2. The incidence of the tax on electrical energy does not depend upon the particular operation in which the energy is used, but upon the business of which it forms a part. Since the predominant business of the dairies here involved (except Pabst Farms) is, and was, that of fluid milk-dealers and distributors, the electricity sold to them by plaintiff, as shown by Exhibits A and B, was sold for commercial consumption; it was sold and used in a commercial business; it was taxable.

3. Plaintiff is entitled to no recovery in respect of the electrical energy sold by it to the dairies, except Pabst Farms, named in Exhibits A and B.

If stipulation showing dates of payment of tax on energy sold to Pabst Farms is filed, let judgment according to the foregoing conclusions be tendered by plaintiff (and approved by counsel for defendant, if found in order) within twenty days after the filing thereof.

Done at Milwaukee, Wisconsin, this 23 day of January, 1947.

F. Ryan Duffy, District Judge.

[fol. 154] IN THE DISTRICT COURT OF THE UNITED STATES

(Caption—1680)

JUDGMENT—Filed February 14, 1947

The above-entitled action having come on for trial before the above Court, without a jury, and the Court having heard and considered all the evidence adduced, and having heretofore filed its opinion in writing and having made its findings of fact and conclusions of law wherein the Court directs that judgment should be entered for the plaintiff and against the defendant only to the extent hereinafter provided;

Now, therefore,

It is hereby ordered and adjudged that the plaintiff recover of the defendant, United States of America, the total principal sum of Two Hundred Eighty-seven and 91/100 Dollars (\$287.91) paid by the plaintiff on and between May 28, 1940 and September 29, 1943 as tax on elec-

trical energy sold to Pabst Farms, and interest on said payments according to law, and that the complaint of the plaintiff be dismissed as to the balance of its claim therein and that it take nothing thereunder except as herein stated.

Dated at Milwaukee, Wisconsin, this 14th day of February, 1947.

F. Ryan Duffy, United States District Judge.

Approved: Van B. Wake, Attorneys for Plaintiff; E. J. Koelzer, Asst. U. S. Atty., Attorney for Defendant.

[fol. 155] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 1680

WISCONSIN ELECTRIC POWER COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant

NOTICE OF APPEAL—Filed May 12, 1947

Notice is hereby given that Wisconsin Electric Power Company, plaintiff above-named, hereby appeals to the Circuit Court of Appeals for the Seventh Circuit from the final judgment entered in this action on the 14th day of February, 1947, which limits the plaintiff's recovery to Two Hundred Eighty-seven and 91/100 (\$287.91) Dollars, and which denies the plaintiff any further recovery, and from the whole of said judgment except such part as does recognize that there is due to the plaintiff at least the said sum of Two Hundred Eighty-seven and 91/100 (\$287.91) Dollars.

Signed at Milwaukee, Wisconsin, this 12th day of May, 1947.

James D. Shaw and Van B. Wake, by Van B. Wake,
Attorneys for Plaintiff and Appellant.

To Timothy T. Cronin, U. S. District Attorney and E. J. Koelzer, Asst. U. S. District Attorney, Attorneys for Defendant and Appellee; Phillip R. Miller, Special Assistant

to Attorney General; W. B. Waldo, Special Assistant to Attorney General.

[fol: 156] IN THE DISTRICT COURT OF THE UNITED STATES

(Caption—1680)

STATEMENT OF POINTS—Filed May 12, 1947

As and for a statement of points, the plaintiff-appellant, Wisconsin Electric Power Company, asserts:

1. The Trial Court erred in its determination that because the sale by dairies of pasteurized milk could be said to involve an activity in the field of commerce, all steps taken and methods and processes utilized in preparing milk for consumption, including the employment of the art of pasteurization, could be characterized as being commercial in nature with the result that electrical energy sold by the plaintiff to such dairies should be considered as sold for commercial consumption and hence taxable within Section 3411 (a) of the Internal Revenue Code.

2. The following portions of the decision of the Court are specifically set forth as being illustrative of the error asserted:

"While pasteurizing is an important part of the business of the dairies here involved, they likewise utilize systems of rapid regular distribution of fresh milk to their customers, and maintain fleets of trucks, horse-drawn wagons and drivers, garages, loading and unloading facilities, weighing and testing devices, storage and refrigeration rooms, and machinery for putting milk into bottles at high speed.

The government makes no effort to collect a tax on the sale of electrical energy from dairies whose predominant business is the making and selling of butter, cheese, ice cream and similar products. However, the business of the dairies here involved was and is predominantly that of fluid milk dealers and distributors.

It seems quite clear that a dairy which does not pasteurize its milk conducts a commercial business. The fact that some dairies do pasteurize their milk does not thereby change the business from commercial to industrial.

A study of the legislative history of Section 3411 of

the Internal Revenue Code discloses that those who were [fol. 157] sponsoring the legislation understood it was the nature of the consumer's business which would be controlling and not the specific operation in that business to which the electrical energy might be put.

I am convinced it was the intent of Congress that the incidence of the tax would not depend upon the particular operation in which the energy was to be used, but upon the nature of the business of which it formed a part. The intention was to tax sales of electricity to commercial businesses, meanwhile exempting sales to industry; and not to require an analysis of the specific functions in which electricity was used in commercial businesses if such uses were incidental to that business.

With due deference to the court announcing the decision in *United States v. Public Service Company of Colorado*, supra, I do think that case was wrongly decided and that judgment herein must go for the defendant, dismissing the complaint to the extent it seeks return of taxes paid on sales of energy to twenty-seven milk dairies."

3. The following portions of the Findings of Fact and Conclusions of Law are specifically set forth as being illustrative of the error asserted:

(From Findings of Fact)

"16. The predominant business of the dairies here involved (except Pabst Farms) is, and was, that of fluid milk dealers and distributors. The electricity sold to them by plaintiff, as shown by Exhibits A and B, was sold for commercial consumption; it was sold and used in a commercial business."

(From Conclusions of Law)

"2. The incidence of the tax on electrical energy does not depend upon the particular operation in which the energy is used, but upon the business of which it forms a part. Since the predominant business of the dairies here involved (except Pabst Farms) is, and was, that of fluid milk dealers and distributors, the electricity sold to

them by plaintiff, as shown by Exhibits A and B, was sold [fol. 158] for commercial consumption; it was sold and used in a commercial business; it was taxable."

4. Plaintiff asserts that the reasoning adopted by the Trial Court fails to give appropriate weight to the factor that the dairies, whose electrical use is under consideration, had organized their enterprises to the end that pasteurization was a vital function upon which all other activities were dependent. Although fitness for ultimate disposition in commerce may be the ordinary objective in the productive process, such circumstance cannot establish the entire undertaking as commercial in character. *United States v. Public Service Co. of Colorado*, (C. C. A. 10th.), 143 F. (2d) 79.

5. The Trial Court erred in receiving evidence over the objection of the plaintiff and in subsequently utilizing the same, at least in part, as the groundwork of the Court's decision for the reason that such evidence was incompetent to establish the issue of the existence of a commercial use of electrical energy sold by the plaintiff to the several dairies. Such evidence, the objections thereto and the ruling on the objections are as follows:

"Mr. Wake: We should like for the purposes of the record, your honor, and consistent with my opening statement as to the stipulation, to object to the materiality and relevancy of certain facts which I will now point out.

The Court: Very well.

Mr. Wake: But our objection, of course, does not go to the accuracy or the type of evidence in the manner of presenting it.

On page 3, under Paragraph 5, about the fifth sentence, it starts as follows: 'The consumers to whom the products are delivered are regular customers,' et cetera throughout the balance of the paragraph. The plaintiff objects on the sole ground that while the evidence is unquestionably true, the plaintiff contends that that matter or the matters therein detailed are not competent, relevant nor material to the issue of law in the case.

Similarly, page 6 of the stipulation, where the reference is next preceding enumerated Paragraph 10: 'Total Personnel and Duties Assigned'. That is a reference to a description of a type of information that appears on practically all of the detailed exhibits. The plaintiff ob-

jects to the information of that character upon the same ground as assigned in the previous objection. [fol. 159] As to the method and manner of detailing all of the rated horse power output, the equivalent kilowatt input, estimated hours daily use—

The Court: What are you talking about now?

Mr. Wake: I am giving some general descriptions—kilowatt hours daily consumption, which is a schedule attached to each dairy study, the plaintiff conceding the approximate accuracy of those figures so far as they originate in estimates does not concede that that is an appropriate form or classification of setting forth the material so far as the issue of law is concerned.

The Court: Well, at this time the objection will be overruled but without prejudice to a later ruling when it comes to that point after the evidence is all in. I can't tell at this time."

(Hereinafter set forth are portions of Stipulation of Facts covered by objections and ruling)

(From page 3, paragraph 5 of Stipulation)

"The consumers to whom the products are delivered are regular customers, and the drivers of the vehicles, who are the employees of the dairies, in delivering the milk cover definite territories or routes each day, delivering regularly to each customer on alternative days, except where specific additional deliveries are requested by such customers. Before the war, deliveries were made daily, and sometimes even more frequently. In some instances, as noted in Exhibits D through N, milk and other dairy products are sold and delivered by the dairies for resale, such as to restaurants, hotels and stores. For all these operations, each dairy maintains a fleet of trucks and other vehicles, and drivers. In most cases, the drivers have standing orders to deliver specified amounts of milk each day. In other cases, the amounts are specified at the time of delivery. The drivers also collect for the milk delivered, obtaining payment from some customers in advance for the milk, from some at the time of delivery, and from some by the week."

James D. Shaw and Van B. Wake, Attorneys for Appellant.

[fol. 160] Bond on appeal for \$250.00 approved and filed May 12, 1947, omitted in printing.

[fol. 161] IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—1680) * *

STATEMENT OF APPELLEE—Filed May 15, 1947

On behalf of the United States of America, appellee in the above-entitled matter, and in accordance with Rule 10(3) of the Rules of the Circuit Court of Appeals for the Seventh Circuit, there is hereby filed for inclusion in the Record on Appeal the names and addresses of the attorneys of record of said appellee as set forth below:

Dated, this 12 day of May, 1947.

Timothy T. Cronin, United States Attorney. E. J. Koelzer, Assistant United States Atty., Room 358 Federal Building, Milwaukee 1, Wisconsin. Philip R. Miller, Special Assistant to Attorney General. W. B. Waldo, Special Assistant.

[fol. 162] IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—1680) * *

STIPULATION AS TO RECORD ON APPEAL—Filed June 10, 1947

It Is Hereby Stipulated by and between the parties, through their respective attorneys of record, that this stipulation may take the place of a designation for documents to be included in the record on appeal, and that such record on appeal to the Circuit Court of Appeals for the Seventh Circuit include such documents as hereinafter enumerated as numbers one (1) to seventeen (17) inclusive.

Dated at Milwaukee, Wisconsin, this 12 day of May, 1947.

James D. Shaw and Van B. Wake, by Van B. Wake,
Attorneys for Plaintiff-Appellant. E. J. Koelzer,
Asst. United States Attorney, Attorney for De-
fendant-Appellee.

1. Summons in Civil Action.
 2. Complaint.
 3. Answer of Defendant.
 4. Plaintiff's Bill of Particulars.
 5. Opinion of Judge Duffy, dated Dec. 31, 1946.
 6. Conclusions and Findings of Fact.
 7. Judgment.
 8. Stipulation of Fact.
 9. Transcript of testimony before Judge Duffy on September 25, 1946.
 10. Plaintiff's Exhibit 1—Schematic Diagram of a Dairy Plant Layout.
 11. Defendant's Exhibit A—"Public Health Bulletin No. 245—Milk Supplies and their Control in American Urban Communities, etc."
 12. Notice of Appeal.
 13. Bond.
 14. Statement of Appellee as to Names and Addresses.
 15. Statement of Points.
 16. Stipulation of Inclusion on Appeal.
 17. Stipulation for printing (if one filed).
-

[fol. 163] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 164]

PLACITA

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the First day of October, in the year of our Lord One thousand nine hundred and forty-six, and of our Independence the one hundred and seventy-first.

No. 9404

WISCONSIN ELECTRIC POWER COMPANY, Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA, Defendant-Appellee

Appeal from the District Court of the United States for
the Eastern District of Wisconsin

And, to-wit, on the nineteenth day of June, 1947, there was filed in the office of the Clerk of this Court an appearance for the appellant, which said appearance is in the words and figures following, to-wit:

[fol. 165] UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

Cause No. 9404

WISCONSIN ELECTRIC POWER COMPANY, Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA, Defendant-Appellee

The Clerk will enter — appearance as counsel for Appel-
lant.

James D. Shaw, Van B. Wake, 773 North Broadway,
Milwaukee 2, Wis.

Endorsed: filed June 19, 1947, Kenneth J. Carriek,
Clerk.

[fol. 166] UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

Cause No. 9404

WISCONSIN ELECTRIC POWER COMPANY, Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA, Defendant-Appellee

The Clerk will enter — appearance as counsel for Appellee.

Sewell Key, Acting asst. atty. Gen.

Endorsed: filed June 19, 1947, Kenneth J. Carrick, Clerk.

[fol. 167] UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

Cause No. 9404

WISCONSIN ELECTRIC POWER COMPANY, Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA, Defendant-Appellee

The Clerk will enter — appearance as counsel for appellee.

Timothy T. Cronin, U. S. Atty.; E. J. Koelzer,
Asst. U. S. Atty., 358 Federal Bldg., Milwaukee,
Wis.; William B. Waldo, Tax Div., Off. of Atty.
General, Washington 25, D. C.

Endorsed: Filed Jan. 2, 1948; Kenneth J. Carrick, Clerk.

[fol. 168] UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

Chicago 10, Illinois

May 13, 1948.

Before Hon. Otto Kerner, Circuit Judge; Hon. Sherman
Minton, Circuit Judge; Hon. Walter C. Lindley, District
Judge.

No. 9404

WISCONSIN ELECTRIC POWER COMPANY, Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA, Defendant-Appellee

Appeal from the District Court of the United States for
the Eastern District of Wisconsin

Now this day come the parties by their counsel, and this cause comes on to be heard on the printed transcript of the record, the briefs of counsel, and on oral argument by Mr. Van B. Wake, counsel for the Appellant, and by Mr. Phillip R. Miller, counsel for the Appellee, and the Court takes this matter under advisement.

[fol. 169] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1947, APRIL
SESSION, 1948

No. 9404

WISCONSIN ELECTRIC POWER COMPANY, Plaintiff-Appellant,

v.

THE UNITED STATES OF AMERICA, Defendant-Appellee

Appeal from the District Court of the United States for
the Eastern District of Wisconsin

May 26, 1948

Before Kerner and Minton, Circuit Judges, and Lindley,
District Judge.

KERNER, Circuit Judge:

This is a suit to recover moneys claimed to have been wrongfully collected for the sale of electrical energy. Plaintiff sold electrical energy to various dairy customers engaged in pasteurization of milk and functions normally incident to such pasteurization. The question before the District Court was whether such sales were sales for other than commercial consumption.

The Internal Revenue Code (26 U. S. C. A. § 3411(a)) provides for the imposition of a tax to be paid by the vendor of electrical energy sold for commercial consumption.

The case was heard by the trial judge, without a jury, upon [fol. 170] evidence and stipulation of the parties. Plaintiff contended that pasteurization is a processing of milk; that the electrical energy sold by it to the dairies was used by the dairies in pasteurization; and hence that was not a commercial use of the electrical energy.

The trial judge made findings of fact and filed an opinion reported in 69 F. Supp. 743, in which he correctly set forth the controlling facts, discussed pasteurization, the legislative history of the section of the Act here involved, and the regulations promulgated by the Secretary; and concluded that the incidence of the tax did not depend upon the particular operation in which the energy was used, but upon the business of which it formed a part, and that since the predominant business of the dairies was that of fluid milk dealers and distributors, the electricity sold to the dairies by plaintiff was sold for commercial consumption.

In this court plaintiff challenges the District Court's conclusion. It argues that pasteurization partakes of the nature of an industrial activity, and cannot be characterized as a commercial activity, and cites the case of *United States v. Public Service Co.*, 143 F. 2d 79, in which the court held, under the facts in that case, that electrical energy sold to dairies and used in pasteurization was not sold for commercial consumption within the meaning of the Act.

We have studied the *Public Service Co.* case, *supra*, and *Michigan Allied Dairy Assn. v. Auditor General*, 302 Mich. 643, 5 N. W. 2d 516, as well as the other cases cited by plaintiff, and considered plaintiff's argument, but we have not been persuaded that the court erred in holding that the proper test to be applied in determining whether the electricity used by a particular consumer falls within the term "commercial consumption" is whether the predominant [fol. 171] character of the enterprise carried on by such consumer is commercial. We agree with Judge Duffy that the wording and legislative history of the Act make it clear that the predominant character of the business carried on by a consumer of electrical energy is what determines whether the electricity sold has been sold for "commercial

consumption"; hence we are content to adopt his opinion as that of this court.

Affirmed.

A true Copy. Teste:

— — —, Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.

[fol. 172] UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

May 26, 1948.

Before Hon. Otto Kerner, Circuit Judge; Hon. Sherman
Minton, Circuit Judge; Hon. Walter C. Lindley, District
Judge.

No. 9404

WISCONSIN ELECTRIC POWER COMPANY. Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA, Defendant-Appellee

Appeal from the District Court of the United States for
the Eastern District of Wisconsin, — Division

This cause came on to be heard on the transcript of the
record from the District Court of the United States for the
Eastern District of Wisconsin, — Division, and was argued
by counsel.

On consideration whereof, it is ordered and adjudged by
this Court that the judgment of the said District Court in
this cause appealed from be, and the same is hereby, Af-
firmed.

[fol. 173] And afterwards, to-wit, on the sixteenth day
of June, 1948, the mandate of this Court issued to the
United States District Court for the Eastern District of
Wisconsin.

[fol. 174] UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages contain a true copy of proceedings had and papers filed in this Court (excepting the briefs of counsel, and a stipulation and order in re: printing of the record) in Cause No. 9404, Wisconsin Electric Power Company, Plaintiff-Appellant vs. The United States of America, Defendant-Appellee as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-second day of June A. D. 1948.

Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit,
by R. Hays Blanchard, Chief Deputy Clerk. (Seal.)

[fol. 175] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 18, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

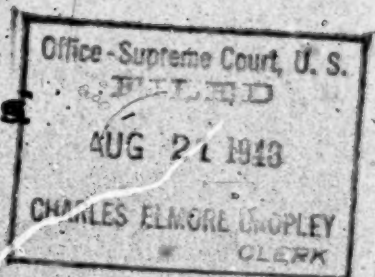
Endorsed on cover: File No. 53,239: U. S. Circuit Court of Appeals, Seventh Circuit, Term No. 237. Wisconsin Electric Power Company, Petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed August 21, 1948. Term No. 237 O. T. 1948.

(9285)

237

LIBRARY
SUPREME COURT, U. S.

No. 237



In the Supreme Court of the United States

October Term, 1948

WISCONSIN ELECTRIC POWER COMPANY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

**Petition for a Writ of Certiorari to the United
States Circuit Court of Appeals for the Seventh
Circuit, and Brief in Support Thereof.**

**VAN B. WAKE,
Attorney for Petitioner,
773 North Broadway,
Milwaukee 2, Wisconsin.**

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In the Supreme Court of the United States

October Term, 1948

No.....

WISCONSIN ELECTRIC POWER COMPANY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

**Petition for a Writ of Certiorari to the United States
Circuit Court of Appeals for the Seventh Circuit.**

**To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:**

**The petitioner prays that a writ of certiorari issue to
review the judgment entered May 26, 1948, in the United
States Circuit Court of Appeals for the Seventh Circuit
which affirmed a judgment entered by the United States**

District Court for the Eastern District of Wisconsin adverse to the petitioner.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 168 Fed. (2d) 285 Advance Sheets. Therein is adopted as and for the opinion of that Court, the opinion of the District Court, reported in 69 Fed. Supp. 743.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered May 26, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938) (28 U.S.C.A. 347).

The cases believed to sustain said jurisdiction are as follows:

United States of America, Petitioner, v. Ogilvie Hardware Company, Inc., 330 U. S. 709 at 711.
(Conflict of decisions on tax refund.)

Edgar S. Albrecht and Geraldine Albrecht, his wife, et al, Petitioners, v. United States of America, 329 U. S. 599 at 620.

(Apparent conflict of decisions and question of widespread importance.)

Beulah B. Crane, Petitioner, v. Commissioner of Internal Revenue, Respondent, 331 U. S. 1 at 5.
(Importance of questions raised on proper construction of Internal Revenue Code.)

Federal Communications Commission, Petitioner, v. Wako, Inc., 329 U. S. 223 at 226.

(Importance of issue to administration of a statute.)

International Railway Company, Appt. and Petitioner, v. George G. Davidson Jr., Individually and as Collector of the Port of Buffalo, et. al,
~~257~~ U. S. 506 at 516.

(Importance of validity of a Treasury ruling.)

SUMMARY STATEMENT.

In this suit petitioner sought the recovery of \$6,806.84 on the ground that such amount was unlawfully collected from it as federal electricity taxes under Section 3411 (a) of the Internal Revenue Code. The period of the transactions subjected to such tax imposition included April 1, 1940, to July 1, 1943, during which time the petitioner sold electrical energy to various dairies engaged in the pasteurization of milk and functions normally incident to such pasteurization and the preparation of milk for sale. It has been and continues to be the position of the petitioner that such sales of electrical energy are not taxable transactions.

The issues presented to the Trial Court by the pleadings, the evidence and an agreed Stipulation of Facts (R. 9-48) involved the validity of the action of the Commissioner of Internal Revenue in rejecting and disallowing petitioner's claim for refund premised upon the sale of electrical energy to dairies being for other than commercial consumption, and for such reason not a taxable transaction under Section 3411 of the Internal Revenue Code.

The opinion of the Trial Court held that sales of electrical energy to dairies constituted a taxable transaction (R. 140-148). Such opinion expressly rejected the contrary view expressed in *United States v. Public Service Co. of Colorado*, (C.C.A. 10th), 143 Fed. (2d) 79, 6R. 146). Findings

of Fact and Conclusions of Law, together with a judgment dated February 14, 1947, consistent with the view of the District Court were duly entered (R. 147-153; 154).

Upon an appeal taken by the petitioner from such adverse judgment to the United States Circuit Court of Appeals for the Seventh Circuit, judgment of affirmance was entered on May 26, 1948 (R. 168). The opinion there filed comments with approval on the reasoning adopted by the District Court and concludes "hence we are content to adopt his opinion as that of this court." (R. 168.)

STATUTES INVOLVED.

The pertinent portions of Section 3411 of the Internal Revenue Code, Treasury Regulations 42 and 46, promulgated thereunder, together with certain information of historical significance are printed in the Appendix, *infra*, pp. 22 to 26.

QUESTIONS PRESENTED.

1. Whether the determination of the Circuit Court of Appeals for the Seventh Circuit was correct in apparently departing from the principle announced by the Circuit Court of Appeals for the Tenth Circuit in the case of *United States v. Public Service Co. of Colorado*, 143 Fed. (2d) 79, by holding that the petitioner, a public utility, selling electrical energy through non-differentiating meters to its dairy customers for use by them in the pasteurization of milk and in functions normally incident to such pasteurization and in the preparation of milk for sale, was, by reason of a commercial aspect in the dairy business, selling such energy for commercial consumption so as to render such sales taxable under Section 3411 of the Internal Revenue Code, under

which section only energy sold for domestic or commercial consumption is taxable?

2. Whether the decision of the Circuit Court of Appeals for the Seventh Circuit conflicts not only with the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *United States v. Public Service Co. of Colorado*, 143 Fed. (2d) 79, but presents also an apparent conflict with the language contained in or the application of Treasury Regulations 46, Section 316.190?

REASONS FOR GRANTING THE WRIT.

The decision of the Circuit Court of Appeals for the Seventh Circuit in its construction of Section 3411 of the Internal Revenue Code asserted that it would adopt the opinion of the Honorable F. Ryan Duffy, Judge of the District Court of the United States for the Eastern District of Wisconsin, on the question as to whether or not the consumption of electrical energy by dairies was a "commercial consumption" as contrasted from other than commercial consumption such as a processing or an "industrial consumption." Such opinion by Judge Duffy in commenting upon the case of *United States v. Public Service Co. of Colorado*, 143 Fed. (2d) 79, stated, in part, as follows:

" * * * I do think that case was wrongly decided and that judgment herein must go for the defendant * * * " (R. 146.)

Such situation presents a case of apparent conflict. Inasmuch as the proper construction of Section 3411 of the Internal Revenue Code would seem to affect the collection of tax revenue in the relation of all public utility taxpayers to their dairy customers in the United States, the matter appears to be of widespread importance and would seem to justify intervention by this Court on an important point of

statutory construction. Such issue relating to the administration of the Internal Revenue Code involves an important question of federal law which has not been, but which should be, decided by this Court.

2. The decision of the Circuit Court of Appeals for the Seventh Circuit is largely, if not entirely, predicated upon the existence in the dairy industry of a commercial aspect coupled with the reasoning that all uses of electrical energy were in fulfillment of such aspect, regardless of the nature of such specific uses. The applicable Treasury Regulations, however, direct inquiry as to whether or not energy is consumed in "commercial phases of industrial or other business" and the "predominant character of the business carried on at such location" (T. R. 16, Section 316.190), and accordingly, the decision of the Seventh Circuit may conflict with the Regulations or give rise to extreme difficulties in their application.

Wherefore, it is respectfully submitted that this petition should be granted.

Dated, August 19th, 1948.

VAN R. WAKE,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION.

OPINIONS.

One opinion was delivered by the District Court. It was written by District Judge, F. Ryan Duffy and filed December 31, 1946. It appears on pages 140 to 146 of the Record and is reported in 69 Fed. Supp. 743. The opinion of the Circuit Court of Appeals for the Seventh Circuit (Circuit Judges Otto Kerner and Sherman Minton and District Judge Walter C. Lindley, Judge Kerner writing) was filed May 26, 1948, and appears on pages 166 to 168 of the Record. It is reported in 168 Fed. (2d) 285, Advance Sheets.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered May 26, 1948. The jurisdiction of this Court is sought to be invoked under Section 240 (a) of the Judicial Code.

Cases wherein jurisdiction was sustained for the purposes of review by certiorari in internal revenue matters or of matters of widespread importance are:

United States of America, Petitioner, v. Ogilvie, Hardware Company, Inc., 330 U. S. 709 at 711.
(Conflict of decisions on tax refund.)

Edgar S. Albrecht and Geraldine Albrecht, his wife, et al, Petitioners, v. United States of America, 329 U. S. 599 at 620.

(Apparent conflict of decisions and question of widespread importance.)

Beulah B. Crane, Petitioner, v. Commissioner of Internal Revenue, Respondent, 331 U. S. 1 at 5.
(Importance of questions raised on proper construction of Internal Revenue Code.)

*Federal Communications Commission, Petitioner,
v. Woka, Inc.*, 329 U. S. 223 at 226.

(Importance of issue to administration of a statute.)

International Railway Company, Appt. and Petitioner, v. George G. Davidson Jr., Individually and as Collector of the Port of Buffalo, et al., 257 U. S. 506 at 516.

(Importance of validity of a Treasury ruling.)

SUMMARY STATEMENT.

This case was tried upon a stipulation of facts, coupled with evidence introduced on behalf of each party. Findings of Fact and Conclusions of Law were filed by the District Court of the United States for the Eastern District of Wisconsin, in conformity with the opinion of that court, on January 23, 1947 (R. 147). The petitioner is a Wisconsin corporation engaged in the operation of a public utility for the sale of electrical energy in and around Milwaukee, Wisconsin, and in such undertaking is generally subject to Section 3411 of the Internal Revenue Code, which imposes a tax on such energy sold for *domestic or commercial* consumption.

The petitioner, having in its tax payments under Section 3411 included an amount equivalent to the incidence of the tax on its sales to certain dairy customers during the period of April 1, 1940, through July 31, 1943, on May 25, 1944, filed a refund claim with the Collector of Internal Revenue at Milwaukee, Wisconsin, demanding refund of such part of the taxes paid as represented the portion attributable to such sales to dairies. On October 16, 1944, the Commissioner of Internal Revenue disallowed the claim for refund (R. 10). On November 1, 1944, the petitioner filed suit in the District Court of the United States for the Eastern District of Wis-

consin for recovery of the amount of tax specified in its claim for refund in the amount of \$6,806.84 with interest from February 1, 1942, the average date of tax payments.

During the period under inquiry, the petitioner had furnished the electrical energy to its dairy customers and received payments therefor under rates prescribed by the Public Service Commission of Wisconsin and in such payments had not received the amount equivalent to a tax component on such energy sales (R. 13). The petitioner in its claim for refund and in the instant action contended for an exemption from the electrical energy tax in respect of electrical energy sales to dairies upon the theory that the consumption of such energy was other than commercial consumption, rather than commercial, based upon the character of the process of pasteurization (R. 3). As is reflected in the Findings of Fact, the evidence of the petitioner was primarily addressed to the nature and importance of the art of pasteurization as it exists in the dairy industry, while that on behalf of the Government was directed to support its basic contention that a dairy enterprise is inherently commercial in nature, rendering legally immaterial the precise uses of electrical energy therein (R. 148-152).

The District Court entered judgment adverse to the petitioner on February 14, 1947. Judgment of affirmance was entered in the Circuit Court of Appeals for the Seventh Circuit on May 26, 1948, which judgment petitioner now seeks to review.

SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred:

1. In holding that the status of electrical energy sales by petitioner to certain of its dairy customers, *as being either for commercial or non-commercial consumption*, was ascertained, not by reference to the particular operations

in which the energy was used by the customers to process the product sold by them, but through the determination of the existence of a commercial phase in the pursuits of such customers.

2. In adoption, at variance with the theory of Treasury Regulations, a basis of classification for determining taxability dependent upon the principle that the business of the consumer, judged as an entirety, rather than the nature of electrical energy consumption at each separately metered location should govern.

SUMMARY OF ARGUMENT.

I.

The Decision of the Circuit Court of Appeals Decided a Question of Federal Law in a Manner so as to be in Probable Conflict with a Decision from the Tenth Circuit on a Similar Case.

In the case of *United States v. Public Service Co. of Colorado*, 143 Fed. (2d) 79, it was held that the pasteurization of milk in dairies was not a mere incident in a commercial undertaking, but was an industrial phase of such enterprise and the use of electricity therefor was not a commercial use. (Page 12)

The existence of a commercial phase in such an undertaking did not render all activities therein commercial in nature. (Page 12)

In the instant case the Circuit Court of Appeals reached a contrary conclusion. (Page 15)

Exertion of jurisdiction by this Court is justifiable. (Page 15)

II.

The Decision of the Circuit Court of Appeals Appears to have Departed from the Theory and Language of Applicable Treasury Regulations in which the Nature of Electrical Consumption at each Separately Metered Location is Emphasized.

The present decision adopted as the applicable classification for taxability the rule of "the predominant character of the enterprise carried on by the consumer." (Page 16)

Application Treasury Regulations place emphasis upon the predominant function carried on at the location where the energy is used. (Page 16)

Results not contemplated by the Regulations might follow if the language of the present decision were the governing rule. (Page 17)

In the present case the commercial activity, represented by sales, took place away from the premises where the energy was consumed. (Page 18)

The Regulations have continued under repeated re-enactments of the statute and are entitled to judicial recognition. (Page 19)

ARGUMENT.

I.

The Decision of the Circuit Court of Appeals Decided a Question of Federal Law in a Manner so as to be in Probable Conflict with a Decision from the Tenth Circuit on a Similar Case.

In the case of *United States v. Public Service Co. of Colorado*, 143 Fed. (2d) 79, the Circuit Court of Appeals for the Tenth Circuit had before it the contention of the Government that the consumption of electrical energy by dairies for pasteurization of milk was in fact a commercial use, since it was there claimed that pasteurization was but a minor function of the dairy enterprise, and hence was but an incident in a revenue producing business. Such contention was answered by that Court with the following language:

"* * * The government now argues that none of the dairies 'derived its receipts directly from pasteurization of milk or carried pasteurization on as a business,' but that pasteurization was merely an incident to the main enterprise of selling and distributing milk. With equal force, it might be contended that manufacturing is but an incident to the main business of the manufacturer, to-wit, the selling of the manufactured article. In the final analysis all business is commercial. If the ultimate aim of industry is the test to be used in determining whether or not electrical energy used in the industry is taxable, all such energy would be taxable, and the admitted intent of Congress would be defeated." (Page 81)

"* * * Aside from the regulation, however, the electrical energy is exempt. It was not sold for commercial consumption within the meaning of the Act. All industry in a sense is commercial, but admittedly industrial consumption is not included. A manufacturer intends ultimately to sell his goods—his income is derived from the sale of his product. True,

the twenty dairies were buying and selling milk, but they were doing more—they were processing—pasteurizing raw milk in preparation for the market. Although the product sold was milk, it was not raw milk. The electrical energy was not used in a commercial phase of the dairying enterprise, but in the processing or industrial phase of the enterprise." (Page 82)

"In view of the admitted legislative intent, the regulation defining industrial consumption, as distinguished from commercial consumption, was appropriate. The term 'commercial' may have a broad or a narrow meaning. In its broad meaning it encompasses industrial enterprises or all business. In the narrow meaning of the term 'commercial' is included only those enterprises engaged in the buying and selling of goods. The legislative history of the Act would indicate that Congress was using the word 'commercial' in the restricted rather than the broad sense." (Page 80)

The facts of such case before the Court, as set forth on page 80 of the opinion, were as follows:

"The stipulation discloses that the twenty dairies are each engaged principally in the business of pasteurizing, bottling and selling milk. A preponderance of the gross revenue of each is derived from the sale of pasteurized milk and cream. The supply of milk is bought from farmers and is brought to the dairy from milk stations in tank trucks and from country milk routes in cars. The raw milk is then pasteurized, bottled and sold, either at retail or wholesale. Each of the dairies also manufactures and sells ice cream and butter; but the predominant use of electrical energy is in the pasteurization of milk or some necessary operation in connection therewith, that is, cooling or refrigeration, pumping water, washing of bottles and cans."

The opinion also quoted from the findings and conclusions of the Trial Court as follows:

"The trial court found as a fact, 'In all of the twenty dairies whose use of electrical energy is in-

volved in this action, the processing and sale of pasteurized milk and cream, to render it fit for human consumption, represents the predominant character of the business * * * and reached the following conclusion of law, 'The electrical energy involved in this action as utilized and consumed by the twenty dairies is not electrical energy sold for domestic or commercial consumption within the act, supra, but constitutes a 'process' within Article 40 of Regulations 42 adopted by the Commissioner of Internal Revenue * * *.' (Page 80)

The Circuit Court of Appeals for the Seventh Circuit in the instant case described the determination of the Trial Court as being,

"* * * that the incidence of the tax did not depend upon the particular operation in which the energy was used, but upon the business of which it formed a part, and that since the predominant business of the dairies was that of fluid milk dealers and distributors, the electricity sold to the dairies by plaintiff was sold for commercial consumption." (R. 167)

Approval of such determination and the adoption of the opinion of the District Court by the Circuit Court of Appeals appears from the concluding portion of Circuit Judge Kerner's opinion, which reads:

"We have studied the *Public Service Co.* case, supra, and *Michigan Allied Dairy Assn. v. Auditor General*, 302 Mich. 643, 5 N.W. (2d) 516, as well as the other cases cited by plaintiff, and considered plaintiff's argument, but we have not been persuaded that the court erred in holding that the proper test to be applied in determining whether the electricity used by a particular consumer falls within the term 'commercial consumption' is whether the predominant character of the enterprise carried on by such consumer is commercial. We agree with Judge Duffy that the wording and legislative history of the Act make it clear that the predominant character of the business carried on by a consumer of electrical energy is what determines whether the electricity sold has

been sold for 'commercial consumption'; hence we are content to adopt his opinion as that of this court." (R. 167)

The opinion of the District Court thus adopted clearly announced that it constituted a departure from the rule of the Tenth Circuit. Judge Duffy covered such point with the express language:

"However, it seems to me that that Court's decision is contrary to the holding herein on the basis of the following statement in the opinion (p. 82):

'The electrical energy was not used in the commercial phase of the dairying enterprise but in the processing or industrial phase of the enterprise.'

With due deference to the court announcing the decision in *United States v. Public Service Co. of Colorado, supra*, I do think that case was wrongly decided and that judgment herein must go for the defendant, dismissing the complaint to the extent it seeks return of taxes paid on sales of energy to twenty-seven milk dairies." (R. 146)

The decisions of the Circuit Court of Appeals and the District Court in the instant case present a determination in distinct conflict with that announced for the Tenth Circuit in the case of *United States v. Public Service Co. of Colorado*, 143 Fed. (2d) 79. The petitioner asserts the principle of that case to be the sound rule, based upon the legislative history of the enactment in question. A justifiable basis for assumption of jurisdiction by this Court exists not only to reconcile a conflict of decisions, but also to give final determination to a matter of widespread importance on a question of statutory construction dealing with a novel point in internal revenue collection and affecting the relations between the Bureau of Internal Revenue and all taxpayers who sell electrical energy to dairy enterprises.

II.

The Decision of the Circuit Court of Appeals Appears to have Departed from the Theory and Language of Applicable Treasury Regulations in which the Nature of Electrical Consumption at each Separately Metered Location is Emphasized.

In adopting the finding of fact and opinion of the District Court, the Circuit Court of Appeals in the instant case determined the issue of taxability by restating the principle of law involved as follows:

"* * * the incidence of the tax did not depend upon the particular operation in which the energy was used, but upon the business of which it formed a part, and that since the predominant business of the dairies was that of fluid milk dealers and distributors, the electricity sold to the dairies by plaintiff was sold for commercial consumption." (R. 167)

The Court stressed as the applicable criterion "the predominant character of the enterprise carried on by such consumer" (R. 167). It would seem that such quoted language imports a classification for taxability which is at variance with applicable Treasury Regulations, in which emphasis is placed upon the function conducted at the location where the energy is used.

Treasury Regulations 46, Section 316.190 (App. 25) as an introductory statement singles out for taxability all energy sold for domestic or commercial consumption except as otherwise provided, and thereafter details certain categories of use which are admittedly neither domestic nor commercial. Thereafter, the Regulation recognizes that certain commercial or domestic "phases" may exist at a given location as a part of an enterprise which would not generally be subject to tax, stating:

"* * * However, electrical energy is subject to tax if sold for consumption in commercial phases of industrial or other business, such as in office buildings, sales and display rooms, retail stores, etc., or in domestic phases, such as in dormitories or living quarters maintained by educational institutions, churches, charitable institutions, or others."

Finally, the Regulation directs inquiry, independently of the over-all undertaking of the consumer, concerning the predominant function carried on at the location of consumption, declaring:

"Where electrical energy is sold to a consumer for two or more purposes, through separate meters, the specific use for which the energy is sold through each meter, i.e., whether for domestic or commercial consumption, or for other use, shall determine its taxable status. Where the consumer has all the electrical energy consumed at a given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of this tax."

Results not contemplated by the Regulations could reasonably be expected to follow if the language of the Circuit Court of Appeals' decision represents the governing rule. From such language the classification of taxability would be dependent upon the consumer's business as an entirety rather than upon the nature of the consumption at each separately metered location. Thus, in the case of an enterprise clearly industrial in character, such as that of United States Steel, energy consumed would be presumably non-taxable even though supplied at a location where commercial activities were predominant. On the other hand, energy supplied to a textile mill, owned by a chain store organization which sold at various retail stores the entire output of the mill, would become taxable as commercially consumed energy utilized by a predominantly commercial undertaking.

Both of such results, while in accordance with the language of the court decision, would seem to be contrary to the concepts of the Regulation.

In the instant case, despite the determination of the courts below that the dairies were commercial institutions, the commercial aspects of the business were primarily carried on away from the premises where the energy was consumed. Thus, Finding of Fact number eight states:

"8. For all the operations described in the preceding paragraph hereof, each dairy maintains a fleet of trucks and other vehicles and drivers. In most cases, the drivers have standing orders to deliver specified amounts of milk each day. In other cases, the amounts are specified at the time of delivery. The drivers also collect for the milk delivered, obtaining payment from some customers in advance for the milk, from some at the time of delivery, and from some by the week." (R. 149)

A portion of Finding of Fact number seven, which further demonstrates that the commercial activities of the dairies are not carried on at the plants, states:

"* * * Except as retail or wholesale depots are maintained, or as deliveries are made to stores, each of the dairies delivers its milk and other dairy products directly to consumers by use of the horse-drawn vehicles and trucks." (R. 149)

The opinion of the District Court also recognizes that the commercial activities were pursued by the dairies away from their plant locations (R. 141). The exhibits attached to the Stipulation of Facts (R. 19-48) show in detail that the plants are not the locations of commercial sales. In only one instance are there any direct sales on the premises where in the case of a small dairy the stipulation states:

"A retail store maintained in the front of the plant building sells about 25 per cent of the ice cream"

and a very small per cent of the milk pasteurized and bottled." (Exhibit I, R. 33)

On the other hand, in the instance of at least one large dairy, the stipulation recites, "This company also has three distribution branches at other locations in the city, for which no exemption from tax is claimed; and a part of each day's output of this plant is delivered to these three distribution branches after being bottled or packaged" (Exhibit E, R. 121).

Under the language of the decision of the Seventh Circuit, though not within the ambit of the applicable Regulations, the Act could easily be carried into a factual situation never intended by Congress to be covered because of the assumed commercial phase of the functions of a dairy. Thus, should one of the Wisconsin dairies in question own and maintain its own herd of cattle at a location naturally removed from the dairy plant, own either directly or indirectly an electrical distribution system from farm to pasteurization plant, own a bottle manufacturing plant separately located, and own a geographically separated ice manufacturing plant, all of which facilities were entirely used by the dairy in the furtherance of its business of supplying pasteurized milk to others; and should each be separately metered, the language of the decision would be sufficiently extensive to render each of the separate pursuits a taxable function. Certainly, the Regulations do not purport to extend the law to such limits.

The Treasury Regulations have existed in substantially the same form since the enactment of the present law in 1933. Even under the Revenue Act of 1932, when the tax was one imposed directly upon the consumer, they were cast in substantially the same form except for their direction upon the consumer rather than upon the vendor of electrical energy. Such regulations continuing under re-enactment of

a specific act are not subject to judicial disregard except for reasons of substance. In the case of *Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, v. Robert C. Winmill*, 305 U. S. 79 at page 83, it was said:

"Treasury regulations and interpretations, long continued without substantial change, applying to unamended or substantially re-enacted statutes, are deemed to have received congressional approval and have the effect of law.

"There has been tacit, if not express judicial approval for the administrative treatment of commissions as an element of the cost of securities."

See also *Thomas W. White et al, former Collector of Internal Revenue for the District of Massachusetts, Petitioner, v. Winchester Country Club*, 315 U. S. 32 at 41.

The only substantial variation attempted by the Regulations has been the deletion of the word "process" in describing or illustrating those activities which were clearly industrial in character. This change occurred on November 28, 1941, and was held by the Tenth Circuit to be ineffective to place pasteurization (admittedly a process) into a non-industrial category. That court in the case of *United States v. Public Service Co. of Colorado*, 143 Fed. (2d) 79, on this point stated at page 81:

"The regulation does not conflict with the express terms of the statute unless it may be said that processing is a commercial transaction as the term is used in the Act. The Treasury Department for nine years did not think so. The regulation, being a contemporary construction of the Act, is entitled to respectful consideration and is not to be overruled except for weighty reasons."

The language of the decision of the Seventh Circuit, upon which review is now sought, appears to extend the field of

taxability to limits not justified by congressional intention as reflected through legislative history.

CONCLUSION.

A rather clear conflict seems manifest between the present decision of the Circuit Court of Appeals for the Seventh Circuit and that which represents the determination of the Tenth Circuit. A matter of widespread importance has been presented by comparison of such decisions, independently of the issue of technical conflict. The exercise of jurisdiction by this Court would be further justified by the apparent divergence between the immediate decision and the applicable Treasury Regulations both in language and theory.

Respectfully submitted,

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APPENDIX.

Internal Revenue Code:

SEC. 3411. TAX ON ELECTRICAL ENERGY FOR DOMESTIC OR COMMERCIAL CONSUMPTION.

(a) There shall be imposed upon electrical energy sold for domestic or commercial consumption and not for resale a tax equivalent to 3 per centum of the price for which so sold, to be paid by the vendor under such rules and regulations as the Commissioner, with the approval of the Secretary, shall prescribe. The sale of electrical energy to an owner or lessee of a building, who purchases such electrical energy for resale to the tenants therein, shall for the purposes of this section be considered as a sale for consumption and not for resale, but the resale to the tenant shall not be considered a sale for consumption.

• • •

(26 U.S.C. 1940 ed., Sec. 3411.)

Section 3411 (a) was amended by the Revenue Act of 1941, c. 412, 55 Stat. 687, Sec. 521 (a) (19), to change the three per cent tax to three and one-third per cent but left the section otherwise the same.

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 616. TAX ON ELECTRICAL ENERGY.

(a) There is hereby imposed a tax equivalent to 3 per centum of the amount paid on or after the fifteenth day after the date of the enactment of this Act, for electrical energy for domestic or commercial consumption furnished after such date and before July 1, 1934, to be paid by the person paying for such electrical energy and to be collected by the vendor.

• • •

Act of June 16, 1933, c. 96, 48 Stat. 254: .

Sec. 6. (a) Effective September 1, 1933, section 616 of the Revenue Act of 1932 is amended to read as follows:

SEC. 616. TAX ON ELECTRICAL ENERGY FOR DOMESTIC OR COMMERCIAL CONSUMPTION

(a) There is hereby imposed upon electrical energy sold for domestic or commercial consumption and not for resale a tax equivalent to 3 per centum of the price for which so sold, to be paid by the vendor under such rules and regulations as the Commissioner, with the approval of the Secretary, shall prescribe. The sale of electrical energy to an owner or lessee of a building, who purchases such electrical energy for resale to the tenants therein, shall for the purposes of this section be considered as a sale for consumption and not for resale, but the resale to the tenant shall not be considered a sale for consumption.

• • •

Treasury Regulations 42, promulgated under the Revenue Act of 1932:

Art. 40. *Scope of tax.*—The tax applies to the amount paid for all electrical energy furnished for domestic or commercial consumption, either by a privately or publicly owned operating electrical power company.

"Electrical energy for domestic or commercial consumption" includes all electrical energy furnished the consumer except electrical energy furnished for industrial consumption. Electrical energy for industrial consumption includes that used generally for industrial purposes, that is, in manufacturing, processing, mining, refining, irrigation, shipbuilding, building construction, etc., and by public utilities, waterworks, telephone, telegraph, and radio companies, railroads, and other common carriers.

The tax attaches to all amounts paid for electrical energy for domestic or commercial consumption

irrespective of whether any of the energy paid for is actually used. In other words, the tax is due on all payments for electrical energy whether in the form of a minimum charge, a flat charge, or otherwise.

T. D. 4393, XI-2 Cum. Bull. 322 (1933):

Section 516 of the Revenue Act of 1932 was amended by section 6 (a) of the Act of Congress approved June 16, 1933 (Public, No. 73, Seventy-third Congress). In conformity with the law as so amended, Chapter V of Regulations 42, approved October 22, 1932, is amended, effective with respect to electrical energy sold on or after September 1, 1933, to read as follows:

Art. 39. *Effective period.*—The tax applies to electrical energy sold on or after September 1, 1933, and before July 1, 1935.

Art. 40. *Scope of tax.*—The tax is imposed upon electrical energy sold for domestic or commercial consumption and not for resale, except as provided hereinafter.

The term "electrical energy sold for domestic or commercial consumption" does not include (1) electrical energy sold for industrial consumption, e.g., for use in manufacturing, processing, mining, refining, shipbuilding, building construction, irrigation, etc., or (2) that sold for other uses which likewise can not be classed as domestic or commercial, such as the electrical energy used by public utilities, waterworks, telegraph, telephone, and radio communication companies, railroads, other common carriers, educational institutions not operated for profit, churches, and charitable institutions. However, electrical energy is subject to tax if sold for use in the commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc.

Where electrical energy is sold to a single consumer for two or more purposes, through separate meters, the specific use for which the energy is sold through each meter, i.e., whether for domestic or commercial consumption, or for other use, shall determine its taxable status. Where the consumer has all the electrical energy used at a given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of this tax.

• • •

Treasury Regulations 46 (1940 ed.):

Sec. 316.190 (as amended by T. D. 5099, 1941-2 Cum. Bull. 267). *Scope of tax.*—The tax imposed by section 3411 (a) of the Internal Revenue Code, as amended, applies, except as provided hereinafter, to all electrical energy sold for domestic or commercial consumption and not for resale.

The term "electrical energy sold for domestic or commercial consumption" does not include (1) electrical energy sold for industrial consumption, e.g., for use in manufacturing, mining, refining, ship-building, building construction, irrigation, etc., or (2) that sold for other uses which likewise can not be classed as domestic or commercial, such as the electrical energy used by electric and gas companies, waterworks, telegraph, telephone, and radio communication companies, railroads, other similar common carriers, educational institutions not operated for private profit, churches, and charitable institutions in their operations as such. However, electrical energy is subject to tax if sold for consumption in commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc., or in domestic phases, such as in dormitories or living quarters maintained by educational institutions, churches, charitable institutions, or others.

Where electrical energy is sold to a consumer for two or more purposes, through separate meters, the

specific use for which the energy is sold through each meter, i.e., whether for domestic or commercial consumption, or for other use, shall determine its taxable status. Where the consumer has all the electrical energy consumed at a given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of this tax.

The District Court in attempting to view the problem from the standpoint of legislative intent quotes from remarks made by Senator Harrison as a member of the Senate Finance Committee in a discussion concerning a proposed revision in 1933 in which he said:

"I am telling the Senators nothing new when I remind them that we had a fight here in 1932 over the imposition of this tax. The Senate imposed a three per cent electric energy tax, and it was finally adopted, to be collected from the consumer of electric energy. We applied that only on domestic and commercial energy: *that is, electric energy used in stores and dwellings that are classified as commercial and domestic.* There was no tax in the 1932 act imposed upon energy employed in industry." (T. 144.) (Italics supplied.)

Senator Reed also commented along the same general lines when he indicated that electrical energy sold for commercial use as well as domestic, "means that we shall get our revenue out of electricity *sold to shops and offices and places of that sort*" (75th Congressional Record, Part II, page 11608).

BRIEF FOR THE PETITION- ER.

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No. 237

In the Supreme Court of the United States
October Term, 1948

WISCONSIN ELECTRIC POWER COMPANY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

**On Writ of Certiorari to the United States Circuit
Court of Appeals for the Seventh Circuit.**

BRIEF FOR THE PETITIONER

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OPINIONS

One opinion was delivered by the District Court. It was written by District Judge F. Ryan Duffy and was filed December 31, 1946. It appears at page 140 of the Record and is reported in 69 F. Supp. 742. The opinion of the Circuit Court of Appeals for the Seventh Circuit, (Circuit Judges Otto Kerner and Sherman Minton and District Judge Walter C. Lindley, Judge Kerner writing) was filed May 26, 1948, and appears at page 166 of the Record. It is reported in 168 F. (2d) 285. This opinion confirms and adopts the opinion of Judge Duffy.

JURISDICTION

A petition for writ of certiorari was granted by this Court on October 18, 1948. The judgment of the Circuit Court of Appeals was entered on May 26, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U.S.C.A. 347), and decisions thereunder determining the appropriateness of the exercise of certiorari.

Review is sought of a decision of the Circuit Court of Appeals for the Seventh Circuit conflicting with one rendered by the Circuit Court of Appeals for the Tenth Circuit on a matter of widespread importance involving the proper construction of a section of the Internal Revenue Code. The Government has not opposed such review.

STATEMENT OF THE CASE

This is a suit for the recovery of \$6,806.84 (with accrued interest thereon from February 1, 1942), on the ground that such amount was unlawfully collected from the petitioner, a Wisconsin public utility corporation, as federal electrical energy excise taxes levied and collected under the direction of the Commissioner of Internal Revenue, purporting to act under Section 3411(a) of the Internal Revenue Code.

The transactions subjected to tax were sales of electrical energy by the petitioner to twenty-eight customers engaged in the dairy business in and around the cities of Milwaukee and Racine, Wisconsin, during the period of April 1, 1940, to July 31, 1943 (R. 10). As to one of these dairies the District Court found that it was not a fluid milk dealer or distributor but a manufacturer (R. 152-153). Separate meters were not installed on any of the premises of the several dairy customers so as to enable a differentiation to be made as to the precise purpose for which electrical energy was actually

consumed in the dairy operations, fifteen of the twenty eight dairies being supplied through more than one meter installation with the balance being supplied by a single meter installation for each consumer (R. 14, 147, 148). During the taxable period, the petitioner paid taxes on sales of electrical energy furnished to these twenty-eight dairy customers computed at the rate of 3% to June 30, 1940, and 3 $\frac{1}{4}$ % thereafter.

Each of the dairies in question engaged in the pasteurization of milk and functions normally incident to such pasteurization and the preparation of milk for sale, and used the electrical energy purchased by them from the petitioner for these several functions, which factual situation has been and now is claimed on behalf of the Government to afford the basis for the imposition of the tax.

On May 25, 1944, the petitioner filed with the Collector of Internal Revenue a claim for refund of these taxes on the ground that it had erroneously treated the sales of electrical energy as sales for domestic or commercial consumption. This claim was rejected by the Commissioner on October 16, 1944 (R. 148). The instant suit was seasonably filed on November 1, 1944, and judgment was entered for the respondent in the District Court of the United States for the Eastern District of Wisconsin on February 14, 1947, with appeal to the Circuit Court of Appeals for the Seventh Circuit, followed by judgment of affirmance on May 26, 1948 (R. 2, 9, 166).

1. Nature of the Art of Pasteurization

As indicated in the testimony of Dr. Hugo Sommer, pasteurization of milk is an activity which employs both physical and mechanical operations through the use of machinery and equipment specifically designed for the pur-

pose and entailing an investment of substantial magnitude. The cost of such equipment probably equals between 15% to 20% of the cost of all plant equipment and its necessary installation accounts for a substantial amount of space in the plant devoted solely to its functioning, or to the necessary incidents of using the pasteurization equipment in connection with the balance of the plant equipment and machinery (R. 68, 72, 73).

By virtue of the pasteurization, milk is raised to a temperature of between 143 degrees to 145 degrees F., maintained thereat for a period of about thirty minutes, and then subjected to sudden cooling, to a point between 38 degrees to 40 degrees F., whereby certain chemical changes are induced in the milk (R. 71, 73).

Precise timing and exact temperature controls are important and the treatment of milk requires consecutive, well-coordinated steps with no substantial interruption in the treatment (R. 70). The precise virtue of the specially adapted machinery and equipment is that it attains requisite heat transfer with suitable dispatch (which, of course, includes the subsequent cooling) without jeopardizing the product (R. 71). In order that such heat transfers are accomplished efficiently, mechanical and physical methods are employed to constantly change the surface of the milk to be acted upon by the heat transfer so that heating is not dependent upon convection currents within the milk fluid to effect the requisite temperature change (R. 71, 72).

According to the testimony of Dr. Sommer, the specific engineering problem governing the design of pasteurizing equipment and the objective to be achieved by the appropriate and careful use of such equipment is the application upon milk of heat of requisite intensity and for a sufficient duration as will be necessary to kill pathogenic bacteria.

therein, meanwhile producing chemical changes in such milk, while staying within such tolerances as will not destroy the natural creaming properties nor impart a scorched taste to it (R. 74, 87).

An inherent attribute of the process of pasteurization includes the cooling of the milk from a fahrenheit temperature of 143 degrees to about 38 degrees (R. 68, 78). There is a desire that such cooling shall be prompt and sudden, such being the practice in most dairies, and there is a theory entertained in some respectable quarters that sudden induced cooling has a lethal effect upon such bacteria as may have escaped heat annihilation (R. 68, 76).

As part of such cooling, milk is sometimes caused to cascade down over cool surfaces to afford a form of aeration (R. 75). To permit of proper, prompt cooling, the cooling equipment of pasteurization plants must be of much greater capacity than would be the case if cooling was to be merely from the temperature of the milk upon its receipt at the plant to a proper holding temperature, as stated by Dr. Sommer (R. 67, 77).

Electrical energy is used both directly and indirectly to further the heating and cooling steps in the pasteurization process of dairy plants. Such energy is used directly for agitating the milk as well as for pumping it to and from the pasteurizing vats and is also used to pump the necessary hot water employed in raising the temperature of the milk, in pumping the refrigerant necessary for induced cooling, or pumping deep well water where that is used as part of the cooling process (R. 72, 73). Other dairy uses of electrical energy which may be classified as direct are those which assist in the rendition of by-products of pasteurization, such as the churning of butter, the preparation of skim milk, cottage cheese, cultured buttermilk, and the production of

homogenized milk, a distinctly mechanical and physical process (R. 69; 70, 76). Examples of uses of electrical energy which indirectly assist in the pasteurization process are electrical consumption for plant lighting, for boiler feed pumps and for the operation of shop tools or cleaning devices, to mention a few. Bottling devices also assist in the reception of the pasteurized milk from the pasteurizer. Petitioner has sought by means of its Exhibit 1 to demonstrate generally the relationship of pasteurizing equipment and other machinery in a dairy plant so that direct and indirect uses of electrical energy and the functional character of a pasteurizing plant will be more apparent (R. 57-123). Electrical energy is also used by the dairies for lighting administrative offices and garages, as well as all portions of the dairy plant (R. 151).

The process of pasteurization of milk results in effectively removing or controlling any bacteria content which may be present in the milk. In this manner, a consumer is protected from the baleful consequences which might otherwise follow should pathogenic bacteria exist and remain in the milk in an uninhibited condition. Another useful objective which is accomplished through milk pasteurization and the chemical changes induced thereby is the destruction of certain enzymes, naturally present in raw milk, such as lipase, which if allowed to remain would split the milk fat and give the milk a rancid odor. This result, important in the production of all milk products for use, has added significance in the preparation of homogenized milk. By the analysis of pasteurized milk for the quantitative content of the enzyme called phosphatase, the relative induced chemical change in the milk and hence the comparative efficacy of the pasteurization process for such milk can be ascertained. A secondary effect of the pasteurization is to impart to milk an enhanced preservative characteristic through the destruc-

tion of a high percentage of all bacterial content (R. 73, 81, 83). According to the belief of Dr. Sommer, no other method exists by means of which all of the beneficial attributes of pasteurization can be accomplished (R. 80).

Paragraph six of the stipulation mentions the City of Milwaukee ordinance requiring pasteurization of milk sold in the City as well as the hygienic objective thereby achieved (R. 11). Paragraph seven of such stipulation specifies the several consecutive steps in the handling of milk from its receipt, through the continuous successive temperature changes and, finally, its immediate and direct disposition into bottles or other suitable containers. The bottled milk is then placed in a storage room kept at about forty degrees fahrenheit to permit the cream line to form and held there several hours for such purpose, or up to one day if the delivery schedules of milk routes are better subserved by such additional storage time (R. 11-12). The prevailing practice is to bottle only enough milk for the next delivery requirements (R. 75).

2: Practical Aspects of Pasteurization

Dr. Sommer stated that, at least in Wisconsin, pasteurization is a typical part of the operation of every dairy plant of any consequence (R. 69). Pasteurizing plants are generally large plants tending toward substantial capacity, as compared to raw milk plants (R. 69). The concentration of milk handling machinery in sizeable plants where pasteurization of milk is a prime plant function and in a large measure regulates the other productive activities of the plant, springs largely from public reluctance to buy unpasteurized milk (R. 83). No comparable process exists (R. 87). Although hygienic control of herds and human handlers of raw milk are helpful in preventing the dissemination of

disease and contagion, they are not wholly effective, since the greatest chance of spreading milk-borne disease arises from the time of milking to the point where milk is received in the assembling plant (R. 81, 83, 89). Limited size usually characterizes raw milk distribution plants and, as such organizations grow they tend to turn toward obtaining larger plants designed around the process of pasteurization. This change is encouraged and even directed by public official authority in the recognition that the relative danger from unpasteurized milk is increased with any substantial growth of raw milk plants (R. 83, 87).

The leadership of public agencies in seeking to control or minimize the distribution of raw milk and in educating the public in the salutary aspects of utilizing pasteurized milk has resulted in tangible expression by the consumer of his preference for milk so protected (R. 83). The economic aspects of pasteurization reflect this trend. Although the process was not undertaken on a widespread scale until 1897 and did not come into use in Milwaukee until 1903, by 1910 or 1915 it had become quite common to such city (R. 85). Although there were still more raw milk plants in the United States than there were pasteurizing plants, as shown by the survey set forth in Public Health Bulletin No. 245, the greater concentrated groups of population had available to them milk processed in pasteurization plants. The table shown on page 25 of the Bulletin reveals that 74.7 per cent of the total milk supply of all municipalities of over 1,000 population in the United States was protected by pasteurization. Such percentages for municipalities over 10,000 and of 500,000 and over, were respectively, 83.1 and 97.5. (Respondent's Exhibit A, R. 136).

The prevailing practice in the operation of pasteurization plants is to make disposition of the major portion of the

processed product at locations beyond the confines of the plant and to customers regularly served through a distribution facility and an organization maintained in common ownership with the plant (R. 10). The dairies utilize a system of rapid regular distribution of fresh milk to their customers and maintain fleets of trucks or other vehicles operated, serviced and maintained by employes of the dairies to effect the distribution and sale of pasteurized milk (R. 10). There may be occasional or infrequent instances where peddler routes are organized for the purpose of buying and reselling pasteurized milk but in such circumstances the milk is sold to the operators of such routes by pasteurizing plants as a mere incident of their general enterprise (R. 85, 91).

3. Facts Pertaining to the Dairy Customers of the Petitioner

The parties have sought by means of their joint stipulation of facts to produce sufficiently detailed information to enable the making of an analysis of the types of operations conducted by the several dairy plants. These plants make contracts with farm producers for purchase of daily raw milk requirements, which are sometimes delivered to the dairy plants by the producers or the dairies may through their own trucks and drivers pick up raw milk at the premises of the producer. When the raw milk reaches the plant, it is weighed, tested and mixed to obtain standard quality and passed into the pasteurization machinery or temporarily held in vats for such purpose (R. 67, 149). Exhibit A of the Stipulation shows the number of meters and the types of electrical service utilized by each of the dairy plants (R. 14). Paragraph two of the Stipulation gives additional information in respect of the electrical service furnished and points out the several types of service or optional rates which the

dairies are entitled to demand (R. 9). It is pointed out in such paragraph that the separate power meters are not so connected to the load as to enable the energy supplied for one purpose or another in the operations of the plant to be differentiated. Of the twenty-eight dairies listed, twenty are obtaining three-phase service, which is ordinarily furnished only where a power consumer has motors of substantial size and a relatively large demand for power (R. 14).

Paragraph eight of the Stipulation sets forth, in general, an outline of the general uses of electrical energy which are common to most of the plants, inclusive of lighting (R. 12). It is therein asserted that the larger dairy plants differ from the smaller chiefly in the number of units available for different operations and that in a few instances there may be additional uses of electricity, as shown in the detailed exhibits. Generally, however, electric motors are used for the following purposes, which uses are common to some or all of the plants: for pumping refrigerants, for delivering milk to, through and from the pasteurizers by pumps as necessary, for operating the homogenizer, where there is one, for delivering milk to the bottling machines, for operating cream separators, and for operating some of the machinery used in washing, sterilizing and conveying bottles.

Exhibits D to N of the Stipulation contain general information in respect of the operations of eleven specifically named plants which afford typical examples of the other seventeen plants enumerated and compared under paragraph ten of the Stipulation (R. 19-47). The exhibits show the nature of the business conducted by the several plants as to the sale of pasteurized milk and other related products, as well as the extent, if any, that other products may be sold as an incident of the operations. For example, some of

the plants bottle and sell fruit juices. To the extent that these juices are sold in the same form as when received by the plants, such handling and sale might be considered as similar to a commercial enterprise. If, however, fruit concentrates are purchased by the plants, are then mixed in the plants and bottled, such handling might, under the circumstances, be considered as a plant function rather than as a commercial function. At least in some of the plants, inclusive of the Layton Park Dairy, the latter practice prevails. (R. 93, 102).

The exhibits also show the quantity of milk received during the average day, the daily yield of the plant, both during the period of time involved in this lawsuit and the gross receipts of business in a typical year and the percentages thereof to the various products delivered from the several plants. It would seem that where the figures are available, they show that between 63 to 77 per cent of the gross receipts of the dairy plants originate from the sale of pasteurized milk. If pasteurized cream is considered along with the milk, the percentages become higher (R. 19-47).

The total personnel and their respective duties are also mentioned in the exhibits and reference is therein also made to the number of employes engaged in distributing milk who operate out of the plant, as well as those who do not come to the plant but may operate from branch distribution points. The number of conveyances used to distribute the pasteurized milk also appears upon the exhibits.

The methods employed in the distribution of milk and the operation of distribution routes with the relationship between the route men or salesmen and their customers are shown in paragraph five of the Stipulation. The entire business contact seems to be carried on by these delivery vehicle drivers while away from the plant premises (R. 10).

The petitioner has, while admitting the accuracy of the stipulated facts, objected to the introduction of the evidence as to the activities of the milk salesmen, the assignment of personnel to various activities of the dairy plants and as to their methods and results of distribution, upon the ground that such evidence is irrelevant and immaterial and not probative of the issues before the Court (R, 55, 56).

The exhibits also show the number of electric motors in use in the several plants and, where possible, the specific functions performed by such motors. By considering the capacities of the several motors in terms of kilowatt input (which is erroneously referred to in the second footnote as "output," but which does not affect the result) and the estimated number of hours of work performed by them, estimates of the relative consumption of energy for the general types of plant operations are developed. Petitioner does not concede that the facts thus developed are legally material because many of the plant functions and uses of electrical energy in the plant are so intimately connected with general plant operations, or with functions at least indirectly connected with the process of pasteurization, as to make such attempted separation lacking in reality.

The exhibits disclose that the general business of the dairies at the premises to which electric energy was furnished was the preparation of milk for market. Exhibit E shows that Luick Dairy Company had daily receipts of milk of 175,000 pounds (20,000 gals.) and that the daily yield of the plant consisted of 16,500 gallons of pasteurized milk, 800 gallons of pasteurized cream, 500 gallons of buttermilk, 1,300 pounds of cottage cheese, 1,300 gallons of chocolate milk and 500 gallons of orange drink (R. 21). The Golden Guernsey Dairy Co-Operative (Exhibit F), in addition to the dairy products produced at the Luick Dairy Company, also

had a daily yield of butter and powdered skim milk in substantial quantities (R. 25). At the Blochowiak Dairy Company (Exhibit G) the yield of butter, cottage cheese and chocolate milk constituted 30% and pasteurized milk and cream 70% of the business of the company (R. 27). The yield of the Layton Park Dairy Company (Exhibit H) was also in the proportion of 70% pasteurized milk and cream and 30% allied dairy products (R. 37). Many types of mechanical equipment are required in each of the dairy plants to which electric energy was furnished. In respect of Luick Dairy Company (Exhibit E) the tabulation shows 99 electric motors used to operate equipment required in the preparation of milk for market (R. 22). Of these 99 electric motors, a minimum of 55 are used for the operation of equipment for pasteurization of milk, separation of cream, homogenizing and manufacture of dairy products. At the Golden Guernsey Dairy Co-Operative (Exhibit F) there are listed 95 electric motors used to operate equipment of this consumer in the preparation of milk and dairy products for market (R. 25). Out of the 95 electric motors, 53 are directly associated with pasteurization of milk, separation of cream, homogenizing and manufacture of dairy products.

The extent of operations carried on at these dairy plants is best illustrated by the amount of equipment necessary to distribute the dairy products produced. The Golden Guernsey Dairy Co-Operative (Exhibit F) requires 140 trucks in daily use to deliver the dairy products procured at its plant (R. 24). The Blochowiak Dairy Company requires 30 trucks to make daily delivery of the dairy products produced at its plant (R. 27). The daily output of the Layton Park Dairy Company (Exhibit H) is delivered by 15 trucks and 5 wagons (R. 30).

Paragraph eleven of the Stipulation asserts that the

average dairy plant cost of operation amounts to about one cent per quart as compared to about four cents per quart for distribution costs of bottled milk and other products, and nine and six tenths cents per quart for the cost of raw milk (R. 13). Respondent has offered testimony by Professor William P. Mortenson to the effect that pasteurization accounts for about ten per cent of the plant costs (R. 91). This witness admitted that he knew of no plant which separated its pasteurization cost as such, and that most plants do not attempt to functionalize their accounting (R. 92, 94). The witness conceded that he had no work sheets which would substantiate his estimate, and that careful time studies would be necessary to arrive at an accurate result (R. 94). The basis of the opinion expressed was that most of the direct costs were of a small magnitude. When pressed for more details, the witness stated that while, for example, he had not attempted to segregate any of the lighting cost to pasteurization, the expense for light, power and water usually amounted to 3.3 per cent of the total operating cost, *inclusive of the cost of delivering the product* (R. 97).

The respondent offered the testimony of Joseph F. Heil to show generally the relationship of the amount of electrical energy used to supply the requisite cooling for the pasteurization process as distinguished from the amount to supply cooling for holding the milk. The estimates of the witness as to the percentage of the total electrical energy supplied for cooling which was devoted to pasteurization cooling was 32% for Layton Park Dairy, 17% for Golden Guernsey and 37% in the case of Emmer Brothers (R. 104-106). These estimates were based solely on the assumption of ideal conditions of operation for one day's operation (September 21st) and with no knowledge of the actual operations, as contrasted with the theoretical conditions as outlined in certain assumptions (R. 103, 104). The witness admitted

his inability to furnish an estimate of the connected load assignable to that portion of refrigeration used directly in the pasteurization of milk as it comes out of the vats, for example, at the Layton Dairy Plant (R. 109). He assumed a constant temperature of the holding or storage room at 37 degrees, yet pasteurization cooling to only 40 degrees (R. 112, 114). Mr. Heil, for no logical reason of his own, put all the holding tank requirements (holding of milk before pasteurization) in with the requirements for the holding or refrigeration or holding room after bottling merely because such method of approach had been suggested by counsel for the Government (R. 109). Mr. Heil conceded that considerably less cooling would be necessary in the winter time than in the summer for the refrigeration room (R. 106). The witness admitted that if the bottled milk was not held in the cooling room for any length of time, the requirements for this room would be less, yet the witness in his assumptions apparently assumed a holding temperature at full capacity maintained in this room for a whole day (R. 112, 113). The prevailing temperature during the day of the estimates was 75 degrees (R. 106). As shown by the records of the United States Bureau of Weather Statistics, the following average temperatures obtained in Milwaukee:

Yearly average	46.4 degrees Fahrenheit
July Normal	68.2 degrees Fahrenheit—highest
August Normal*	67.6 degrees Fahrenheit
September Normal	61.0 degrees Fahrenheit
December Normal	24.7 degrees Fahrenheit
January Normal	19.4 degrees Fahrenheit—lowest

SPECIFICATION OF ERRORS

The Circuit Court of Appeals, in confirming the views of the District Court and in adopting its opinion, erred in the following respects:

1. In determining that because dairies buy raw milk, process it by pasteurization for disposition in channels of commerce, and sell it at the premises of customers, it can be declared that their predominant business is that of fluid milk dealers and distributors and that all of their activities, wherever pursued, are commercial in nature so that the entire use of electrical energy by such dairies, inclusive of that used for pasteurization is a commercial consumption.

2. In failing to give appropriate weight to the fact that the dairies are dependent upon the art of pasteurization, which process they employ through the use of specially designed and controlled machinery to induce chemical changes in a raw material and thereby convert it into a more refined or economically superior product, pasteurized milk, and in determining that such technology is practiced wholly incidental to a broad plan of marketing milk, analogous to a merchandising of raw milk, and, in consequence, every phase of the total activity is declared to be a component of an undertaking so predominantly commercial as to visit a status of commercial consumption upon all electrical energy employed in the aggregate enterprise.

3. In concluding, in apparent disregard of Treasury Regulations, that the incidence of the excise tax on the sale of electrical energy shall depend upon the predominant character of the integrated undertaking rather than the nature of the activity carried on at the location where the electrical energy is actually consumed.

STATUTES AND REGULATIONS INVOLVED

The issues presented arise under Section 3411 (a) of the Internal Revenue Code. The legislative history of the section and the applicable regulations are set forth in the Appendix, *infra*, pages 51-55, *post*.

SUMMARY OF ARGUMENT

I.

Judicial Determinations Exist to the Effect That the Pasteurization of Milk Does Not Constitute a Commercial Undertaking Although the Milk Is Subsequently Disposed of In the Channels of Commerce.

The circumstance that the ultimate disposition of a product will be its sale does not necessarily render the production thereof a commercial undertaking. (Page 20.)

In the case of *United States v. Public Service Co. of Colorado*, 143 F. (2d) 79, it was held that the pasteurization of milk in dairies was not a mere incident of a commercial undertaking, but, was an industrial processing phase of an enterprise and the use of electricity therefor was not a commercial use. (Page 21.)

Pasteurization effects a change in the form of a raw material and is not a commercial activity. (Page 23.)

The commercial activities of dairies take place away from the plants. (Page 27.)

Pasteurization is an important technological process whereby through the use of mechanical and physical means a useful chemical change is induced in milk. (Page 28.)

Although the production of revenue is facilitated by the use of pasteurization, such result must be distinguished from the method employed. (Page 29.)

II.

The Regulations Have Professed to Distinguish Between What Is Commercial and What Is Non-Commercial Consumption of Electrical Energy.

The early Regulations, both when the law taxed the consumer of electrical energy as well as when it taxed the vendor, included "processing" as a non-commercial activity. (Page 32.)

Such Regulations continuing with reenactments of the Act are presumed to have had Congressional approval. (Page 34.)

The deletion of the word "processing" from the Regulations was not justified by any change in the law nor other evidence of Congressional intent and cannot affect any substantial rights of taxpayers. (Page 35.)

Regulations which are consistent with a statutory enactment continuing under subsequent reenactments are entitled to judicial recognition. (Page 36.)

The Regulations recognize "commercial" phases of non-commercial activities and the importance of determining the predominant function of the location of consumption. (Page 37.)

If such distinctions of the Regulations are to be ignored, results not originally contemplated by the Regulations nor by Congressional intent might ensue. (Page 39.)

III.

**The Predominant Character of the Activities
of a Dairy Plant Is Industrial Processing
Rather Than Commercial.**

Dairies producing pasteurized milk are not solely maintaining milk routes. (Page 41.)

The operation of a pasteurization plant is a predominant portion of a dairy enterprise. (Page 42.)

It has been factually recognized that the dairies in question conduct their commercial activities away from the pasteurization plant. (Page 43.)

The historical background of the dairy industry cannot determine its present status. (Page 44.)

The legislative history of Section 3411 (a) indicates an intention to restrict the imposition of the tax on strictly commercial undertakings. (Page 47.)

9

ARGUMENT

I.

Judicial Determinations Exist to the Effect That the Pasteurization of Milk Does Not Constitute a Commercial Undertaking Although the Milk Is Subsequently Disposed of In the Channels of Commerce.

The issues before the Court originate with the federal excise tax imposed upon the sale of electrical energy. To resolve such issues requires judicial inquiry into the consumption of electrical energy for pasteurization to determine whether or not it may be designated as commercial in nature. The particularly pertinent portion of Section 3411 of the Internal Revenue Code provides:

“(a) There shall be imposed upon electrical energy sold for domestic or *commercial consumption* and not for resale a tax equivalent to $3\frac{1}{3}$ per centum of the price for which so sold, to be paid by the vendor under such rules and regulations as the Commissioner, with the approval of the Secretary, shall prescribe.” (Italics supplied.)

Because commodities are usually supplied in fulfillment of an economic need, it would appear to be fundamental that the production of any article, whether by means of manufacturing, processing or treatment, cannot be characterized as commercial in nature solely by reference to the circumstance that the ultimate disposition of such product will be its sale. To hold otherwise would imply that virtually every conceivable production activity was commercial in nature, which determination would clearly be contrary to Congressional intention.

In the case of *United States v. Public Service Co. of Colorado*, 143 F. (2d) 79, the Circuit Court of Appeals for the

Tenth Circuit fully analyzed the nature of pasteurization of milk and concluded that such activity was not commercial in nature. The facts of that case, as set forth on page 80 in the opinion, are as follows:

"The stipulation discloses that the twenty dairies are each engaged principally in the business of pasteurizing, bottling and selling milk. A preponderance of the gross revenue of each is derived from the sale of pasteurized milk and cream. The supply of milk is bought from farmers and is brought to the dairy from milk stations in tank trucks and from country milk routes in cars. The raw milk is then pasteurized, bottled and sold, either at retail or wholesale. Each of the dairies also manufactures and sells ice cream and butter, but the predominant use of electrical energy is in the pasteurization of milk or some necessary operation in connection therewith, that is, cooling or refrigeration, pumping water, washing of bottles and cans."

The opinion also quotes the findings and conclusions of the trial court as follows:

"The trial court found as a fact, 'In all of the twenty dairies, whose use of electrical energy is involved in this action, the processing and sale of pasteurized milk and cream, to render it fit for human consumption, represents the predominant character of the business * * * and reached the following conclusion of law, 'The electrical energy involved in this action as utilized and consumed by the twenty dairies is not electrical energy sold for domestic or commercial consumption within the Act, supra, but constitutes a "process" within Article 40 of Regulations 42 adopted by the Commission of Internal Revenue * * *."

The opinion of the court sets forth the regulations and their history and then proceeds with an analysis of such regulations in relation to the statute which is intended to tax only *domestic* and *commercial* use of electrical energy. The reasoning of the Court is that Congress used the word "commercial" in a restricted sense which intent was initially followed by the regulations in recognizing that industrial

pursuits, which included processing, were not taxable. Further, that the ultimate aim of a pasteurizer to prepare his product to enable its subsequent sale did not justify belated efforts of the Treasury Department to now characterize processing as commercial in character so as to remove the legal effect of the previous contrary contemporary construction.

Such points are developed in the opinion in the following language:

"In view of the admitted legislative intent, the regulation defining industrial consumption, as distinguished from commercial consumption, was appropriate. The term 'commercial' may have a broad or a narrow meaning. In its broad meaning it encompasses industrial enterprises or all business. In the narrow meaning of the term 'commercial' is included only those enterprises engaged in the buying and selling of goods. The legislative history of the Act would indicate that Congress was using the word 'commercial' in the restricted rather than broad sense.

"(2) The regulation classifies processing as being within the meaning of industrial. It attempts to distinguish industrial use from commercial use. In the first part it gives a general definition of industrial use, and includes therein processing. In the second part it defines generally what is meant by commercial use. In defining these two terms it is apparent that the Treasury Department had in mind the legislative history of the Act recently passed and expressed in the regulation the intent of Congress. This regulation, while it stands, has the force and effect of law unless it is in conflict with an express statutory provision.

"The regulation does not conflict with the express terms of the statute unless it may be said that processing is a commercial transaction as the term is used in the Act. The Treasury Department for nine years did not think so. The regulation, being a contemporary construction of the Act, is entitled to respectful consideration and is not to be overruled except for weighty reasons.

"The contention of the government now would seem to be that the regulation is invalid unless the word 'processing' be interpreted as synonymous with manufacturing. The government now argues that none of the dairies 'derived its receipts directly from pasteurization of milk or carried pasteurization on as a business,' but that pasteurization was merely an incident to the main enterprise of selling and distributing milk. With equal force, it might be contended that manufacturing is but an incident to the main business of the manufacturer, to-wit, the selling of the manufactured article. In the final analysis all business is commercial. *If the ultimate aim of industry is the test to be used in determining whether or not electrical energy used in the industry is taxable, all such energy would be taxable; and the admitted intent of Congress would be defeated.*" (Italics supplied.)

The nature of pasteurization was set forth by the Court as follows:

"(4) It will be assumed that the Treasury Department in the use of the word 'processing' in the regulation used it in its ordinary meaning. Webster defines 'process' as follows:

"to subject (especially raw materials) to a process of manufacture, development, preparation for the market, etc.; to convert into marketable form, as livestock by slaughtering, grain by milling, cotton by spinning, *milk by pasteurizing*, fruit and vegetables by sorting and repacking." (Italics supplied.)

"The courts have generally accepted this definition. The Michigan court in *Michigan Allied Dairy Ass'n. v. Auditor Gen.*, refers to pasteurizing of milk as 'industrial processing.' Pasteurizing milk is 'processing' as the term is ordinarily understood."

The transformation of a raw material, as accomplished by pasteurizing, was recognized by the Court as an industrial pursuit, the opinion concluding:

"(5) * * * Aside from the regulation, however, the electrical energy is exempt. It was not sold for com-

mercial consumption within the meaning of the Act. All industry in a sense is commercial, but admittedly industrial consumption is not included. A manufacturer intends ultimately to sell his goods—his income is derived from the sale of his product. True, the twenty dairies were buying and selling milk, but they were doing more—they were processing—pasteurizing raw milk in preparation for the market. Although the product sold was milk, it was not raw milk. The electrical energy was not used in the commercial phase of the dairying enterprise, but in the processing or industrial phase of the enterprise."

The Supreme Court of Michigan has had before it the question of whether the pasteurization of milk is industrial processing. That court has not only decided such question in the affirmative but has also determined that in view of the method by which a dairy operation is conducted, the use of bottles and cans for the reception of the pasteurized milk is in reality a part of the industrial process and such containers are for that reason exempt from the use tax. The pertinent language of the Court in the case of *Michigan Allied Dairy Ass'n, v. Auditor General, et al.*, 302 Mich. 643, 5 N. W. (2d) 516, 517-518, is as follows:

"Section 4 of the Use Tax Act, *supra*, provides that it shall not apply to '(g) Property sold to a buyer for consumption or use in industrial processing or agricultural producing.'

"The question may be resolved into whether milk bottles and cans purchased by milk processors are used in industrial processing, or whether they only are convenient containers in which to deliver the contents. . . .

.

"* * * We principally confine our discussion to whether milk bottles and cans are used by dairies and creameries for such industrial processing as is exempted by the general sales and use tax acts. After raw milk reaches the dairy or creamery plant and after it has been tested for butter fat content, inspected for

flavor and condition, sampled for chemical content, weighed and emptied into special receiving equipment. It is then treated or handled in two steps. First: It is heated to just over 142 deg. Fahrenheit and kept at that temperature for at least thirty minutes. It is then properly cooled to 50 deg. F. or lower, and as a rule to 40 deg. F., the latter being the lowest temperature at which it can be poured into bottles without foaming. Second: The milk is then poured into bottles or cans emerging from a sterilization chamber at about 80 deg. F., the heat of the bottles raising the temperature of the milk to rise by about 8 deg. F. The bottles are capped, the milk cooled in the bottles to just over 32 deg. F. (freezing), then held at that temperature for the period (as a rule longer than 12 hours) prior to being loaded on wagons for delivery to consumers. By the first step about 99 per cent. of the pathogenic bacteria are killed immediately; by the second step the remaining 1 per cent. is rendered inactive and slowly killed.

"By retaining the capped bottles of milk and cans in a refrigeration room for at least 12 hours, and then delivering them in a cooled condition to the consumers, the milk is kept fresh and free from germs. During the prolonged period of refrigeration in the bottles and cans, the cream line forms and deepens so that the public can see the amount of cream in the bottles. This is one of the conditions of marketability of bottled milk. If the 1 per cent. of germ life not destroyed by the heating process in the first step were left at normal temperature, the bacteria would multiply very rapidly and cause the milk to sour. Only refrigeration for a long period before being put on delivery wagons enables the milk to remain free from bacteria and from souring during the interval between the time the milk leaves the refrigeration room of the creamery until it is placed in the consumer's ice box. These facts were brought out by opinions of five expert witnesses for plaintiff but were in part contradicted by the opinion of one expert for defendant. We are impressed with the opinions of plaintiff's witnesses, not their number. Defendant's witness testified that the refrigeration does not constitute industrial processing.

"The Supreme Court of Arizona, in construing the

word 'processing' in the Arizona Privilege Sales Tax Act, stated: 'It will be seen that the essential portion of the definition is to "prepare raw material" * * * for the market * * *'. *Moore v. Farmers Mutual Mfg. Co. & Ginning Co.*, 51 Ariz. 378, 382, 77 P. (2d) 209, 211, 212.

"Milk is not marketable until rendered suitable for purchase and consumption from the point of view of the consumer, for only milk, which, after pasteurization, has been cooled and protected against subsequent contamination or deterioration may be used with confidence that it has been rendered safe as regards pathogenic bacteria." *Lang's Creamery v. City of Niagara Falls*, 251 N. Y. 343, 344, 167 N. E. 464, 465.

"The Attorney General calls attention to *City of Louisville v. Ewing Von-Allmen Dairy Co.*, 268 Ky. 652, 105 S. W. (2d) 801; *City of Richmond v. Richmond Dairy Co.*, 156 Va. 63, 157 S. E. 728, and *Anheuser-Busch Brewing Association v. United States*, 207 U. S. 558, 562, 28 S. Ct. 204, 52 L. ed. 336, which hold that pasteurization does not constitute a manufacturing process. *These cases do not distinguish between manufacturing processing and industrial processing.* Pasteurization followed by prolonged refrigeration manufactures no new article; but frees the milk from bacteria and keeps it free thereof until it reaches the consumer. To accomplish this it is necessary to put the milk in bottles immediately after it has been subjected to heating. The peculiarities of milk are such that, if it were immediately cooled to just above freezing before being poured into the bottles, foam would form so that the bottles would not be full. While it might be suggested that the milk might be stored in refrigerated vats and put into cool sterilized bottles and cans just before leaving the creamery and thus possibly avoid the growth of bacteria, nevertheless, this would be a less practicable way of handling milk. In any event, we are only considering the accepted practice as disclosed by the record. *We hold that the use of bottles and cans is part of the industrial processing of milk.*" (Italics supplied.)

The definition of processing as being inclusive of the pasteurizing of milk ("to subject. (especially raw materials)

to a process of manufacture, development, preparation for the market, etc.; to convert into marketable form, * * * which was quoted with approval in the *Colorado* case, by the Tenth Circuit Court of Appeals, has also received recognition in other courts.

Moore v. Farmers Mut. Mfg. Co., 51 Ariz. 378, 77 Pac. (2d) 209.

Bedford v. Colorado Fuel & Iron Co., 102 Col. 538, 61 Pac. (2d) 752.

Bald Mountain Mining Co. v. Walsh, 65 S. D. 117, 271 N. W. 819.

Kennedy v. State Board of Assessment and Review, 224 Iowa 405, 276 N. W. 205.

Nye & Nisson v. Wood Lbr. Co., 92 Cal. App. 598, 268 Pac. 659.

Colbert Mill & Feed Co. v. Oklahoma Tax Comm., 168 Okla. 366, 109 Pac. (2d) 504.

Chickasha Cotton Oil Co. v. Cotton County Gin Co., 40 Fed. (2d) 846, (C.C.A. 10th).

Pasteurization cannot be truly characterized as a commercial activity solely by virtue of the fact that the milk is ultimately disposed of in channels of commerce. As shown by paragraph 5 of the Stipulation, practically all of the sales of milk and cream and the financial details in connection therewith, including collections, occur outside of the premises to which the electrical energy is furnished. Most of the retail sales are initiated, negotiated and accepted at the customer's home, with payments collected from the customer at his door, adjustments made there and most of the elements of a commercial transactions completed there, thus removing the incidence of sales and collection away from the dairy plant. The more usual connotation of "commercial" activity is the exchange, or in other words, the buying and selling of goods. *Jordon v. K. Tashiro*, 278 U. S. 123, 127, 73 L. ed. 214.

In the case of *Utah Power and Light Co. v. Pfost*, (D.C., D., Idaho, S.D.) 52 F. (2d) 226 at page 234 it was said:

"* * * There is a distinction between production and commerce, as commerce succeeds production and is not a part of it. Production or manufacture is a transformation of raw material into a change of form for use, while the functions of commerce consist in the purchasing, selling, and exchanging of commodities and the transportation incidental thereto. *Hammer v. Dagenhart et al*, 247 U. S. 251, 38 S. Ct. 529, 62 L. Ed. 1101, 3 A. L. R. 649, Ann. Cas. 1918E, 724."

Pasteurization, rather than being commercial, partakes of the nature of an industrial processing activity. Considerably expensive and specialized equipment and machinery is required for milk pasteurization and its preparation for market. This occurs because the pasteurization process is in itself primarily a mechanical and physical operation, resulting in inducing desirable chemical changes in the product, in which the results are accomplished with the use of a small amount of labor compared to other milk handling operations in connection with a dairy plant. Skilled operators must attend to the pasteurization equipment but their efforts are directed mainly toward starting and stopping the equipment, watching and regulating the operations of the various machines. The pasteurization process itself is composed of work performed upon the milk by machines such as milk pumps, agitators, tanks for holding and pipes for moving milk from place to place and of applications of heat and cold, both of which are generated by other mechanical equipment. Thus, the process employs elaborate equipment, in which the investment is substantial, yet comparatively small operating costs are incurred. With labor at present-day wage rates being so large a factor of operating expense, the economical expenditure of labor costs in pasteurization operations results in low plant costs for such activity, compared to other dairy plant functions where

considerably more manual labor is required. In the courts below the argument on behalf of the respondent has attempted to minimize the relative importance of pasteurization by showing that it is conducted at a cost which is small compared to the value of raw milk and in comparison to merchandising costs for selling pasteurized milk. Such a comparison, however, is an imperfect one unless it is considered in conjunction with the amount of elaborate equipment devoted to pasteurization and the high investment made therein, which performs a vital function with a limited amount of direct labor.

The implied claim on behalf of the respondent in this case that all of the plant activities are related to a commercial enterprise denies the realities which exist. It is the essential character and nature of the technical operations involved which should determine the kind of activity which is being carried on. Even though the major portion of the receipts is ultimately obtained from the sale of a product called milk, it is not the same commodity as the original product, raw milk. As was said in the case of *H. P. Hood & Sons v. Commonwealth*, 235 Mass. 572, 127 N. E. 497:

"It then pasteurizes the milk, which is a subjection of it to heat for the purpose of inducing certain chemical changes."

If this case should be decided in favor of the respondent merely because the dairies which used the electrical energy carried on sales activities beyond the premises where the energy was consumed, such decision would of necessity carry with it every industrial plant which maintained a sales organization, whether on or off its main premises. The Courts have not, however, given such a wide definition nor scope to the word "commercial." In the case of *State ex rel. Kansas City Light and Power Co. v. Smith*, 342 Mo. 75, 111 S. W. (2d) 513, the contention was raised that a statute

imposing a tax upon "sales of electricity or electrical current * * * to domestic, commercial, or industrial consumers" covered sale to and use by a streetcar company of electrical energy to propel its streetcars on the principal ground that the term "commercial" included everything relating to commerce. In denying this contention, the court said:

"If appellant is correct in his contention that the word 'commercial' includes everything pertaining to commerce, then it would also include industrial pursuits; for instance, a shoe manufacturer is engaged in an industrial pursuit in making and selling shoes. If 'commercial' is used in its broad sense, it includes also the word 'industrial.' This the appellant admits, for in his brief he says, 'We respectfully urge upon this court that the term "commercial" as used in this act, might include in its scope "industrial." For both are closely associated; "commercial" includes "industrial." If the word 'commercial' includes 'industrial,' then why did the Legislature use the word 'industrial' also? We have already seen that every word should be given a meaning in construing a statute if possible; we therefore conclude that the word 'commercial' was not used by the Legislature with the intention of including the word 'industrial.' Both were used in the Act, not in the broad sense, but, rather, in a restricted sense.

"The ordinarily accepted use of the phrase 'commercial establishment' denotes a place where commodities are exchanged, bought, or sold, while the ordinarily accepted meaning of the phrase 'industrial establishment' denotes a place of business 'which employs much labor and capital and is a distinct branch of trade; as, the sugar industry.' Webster's New International Dictionary. Thus, we see that the transportation of passengers would not come within the ordinary meaning of either the word 'commercial' or 'industrial.'"

The Missouri Court had no trouble in differentiating between the words "commercial" and "industrial" when they were used in the same statute by employing a canon of construction that every word used in a statute should be given its appropriate significance where possible. The distinction

between the two words is even more apparent where the statute, instead of imposing a tax on the activities included in each word, makes the pursuits within the scope of one word taxable yet withholds as not taxable those callings which are within the ambit of the other word. This does not constitute the creation of an exemption but instead is a legislative mandate to refrain from taxing. Both on the basis of the character and nature of the process of milk pasteurization in its relation to industrial activity and upon the authority of court decisions, a commercial activity is not involved because the product finds its way into economic channels.

II.

The Regulations Have Professed to Distinguish Between What Is Commercial and What Is Non-Commercial Consumption of Electrical Energy.

Originally, the tax on electrical energy, as created by Section 616 (a) of the Revenue Act of 1932, was a tax upon the consumer, though collected by the Vendor. It was imposed and to be collected "for electrical energy for *domestic or commercial consumption* furnished, etc." The Regulations initially promulgated for the administration of this law were in all essential respects similar to those which were subsequently issued when, by amendment in 1933, the law converted the tax to one upon the vendor instead of upon the consumer. Regulation 42, Article 40, as applicable to this tax when it was one upon the consumer, contained the following language:

"All electrical energy furnished the consumer is taxable except (1) electrical energy furnished for industrial, *e.g.*, that used in manufacturing, *processing*, mining, retining, shipbuilding, building construction,

etc, and (2) that furnished for other uses which likewise cannot be classed as domestic or commercial, such as used by public utilities, water works, irrigation companies, telegraph, telephone, and radio communication companies, railroads, other common carriers, educational institutions not operated for private profit, churches, and charitable institutions. *However, electrical energy is subject to tax if consumed in the commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc.*

"Where electrical energy is supplied to a single consumer for two or more purposes, the specific use for which the energy is furnished, i.e., whether for domestic or commercial consumption, or other consumption, shall determine its taxable status. Where the consumer has all the electrical energy used at a given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of electrical consumption for the purposes of this tax." (Italics supplied)

With the early law and regulations in the form as stated above, the distinctions between commercial and other than commercial uses of electrical energy were sharply maintained throughout such regulations at the time when the law imposed the tax upon the purchaser of such electrical energy rather than upon the supplier. As will be subsequently shown, the change in the law so far as to make the burden of the tax fall upon the vendor of the electrical energy did not change other fundamental concepts of the law itself and the segregation of *domestic* and *commercial* consumption as being the only taxable transactions was preserved. Although new regulations were then promulgated to recognize the vendor as the new taxpayer in lieu of his former status of a mere collecting agent for such tax, the distinction of commercial uses of electrical energy as being the only type of business activity sought to be made taxable was preserved in such regulations. The same types

of recognized industrial activities were defined as not being within the scope of commercial pursuits, including processing.

The regulations revised to conform with the law as amended in 1933 preserved the form of illustrating by specific enumeration uses of electrical energy which were considered non-commercial. Article 40 of Regulation 42 read as follows:

"Scope of tax—The tax is imposed upon electrical energy sold for domestic or commercial consumption and not for resale, except as provided hereinafter.

"The term 'electrical energy sold for domestic or commercial consumption' does not include (1) electrical energy sold for industrial consumption, *e.g.*, for use in manufacturing, *processing*, mining, refining, shipbuilding, building construction, irrigation, etc., or (2) that sold for other uses which likewise cannot be classed as domestic or commercial, such as the electrical energy used by public utilities, water works, telegraph, telephone, and radio communication companies, railroads, other common carriers, educational institutions, not operated for profit, churches, and charitable institutions. However, electrical energy is subject to tax if sold for use in the commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc."

"Where electrical energy is sold to a single consumer for two or more purposes, through separate meters, the specific use for which the energy is sold through each meter, *i.e.*, whether for domestic or commercial consumption, or for other use, shall determine its taxable status. Where the consumer has all the electrical energy used at a given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of this tax." (Italics supplied)

Until a change in the Regulations occurred on November 28, 1941, the Regulations continued in the form as

next above stated. On such date, Regulation 46, Section 316.190 (T. D. 5099) was created as the now applicable Regulation. Such new regulation differed from its predecessor in that the word "processing" was omitted from the classification of activities specifically enumerated as non-commercial. Such deletion was held by the Circuit Court of Appeals for the Tenth Circuit to be ineffective to place pasteurization (admittedly a process) into a commercial category. That court said in the case of *United States v. Public Service Co. of Colorado*, 143 F. (2d) 79 at page 81:

"The regulation does not conflict with the express terms of the statute unless it may be said that processing is a commercial transaction as the term is used in the Act. The Treasury Department for nine years did not think so. The regulation, being a contemporary construction of the Act, is entitled to respectful consideration and is not to be overruled except for weighty reasons."

* During the nine year interval when the word "processing" was included in the Regulations, Congress, by five separate provisions¹ continued the legislation, which is the basis of the Regulations. The continuance of the law through amendment, extension or reenactment of the statute was accomplished without any relevant, substantial change in the law which the Regulations purport to construe. It must be presumed that Congress adopted and approved the form and content of such Regulations and did not countenance any change. Under such circumstances, any change

¹ 1932 Act, Sec. 616 (a) (As amended by Sec. 6 (a) of Public No. 73-73rd Congress, approved June 16, 1933, and effective September 1, 1933.)

Reenacted as Sec. 3411, I.R.C. (for energy sold on or after Sept. 1, 1933, and before July 1, 1937.)

Section 713 of the 1938 Act.

Public Resolution 48 (Extended tax to July 1, 1939—approved June 29, 1937.)

Reenacted as Sec. 3411 I.R.C. (By Sec. 210, 1940 Act—changed rate to 3½% to June 30, 1945.)

Sec. 521 (a) (19) 1941 Act.

without Congressional approval or without any foundation in any difference in the law, amounts to a form of improper administrative legislation.

The newly created Regulation professed no significant changes except that for the first time the word "processing" was deleted. Such revision of a regulation which had been permitted to exist for more than nine years is not accounted for by any change in the law nor any other evidence of Congressional displeasure with the previously existing form of the regulation. Nothing has intervened to justify any change in the regulation as might have the effect of changing applicable rules. The commencement of the *Colorado Public Service Company* case would not afford such a justification. A portion of the taxable period involved in the instant controversy existed under the former Regulation.

A change in theory now entertained on behalf of the Commissioner would not sanction such departure from the fundamental precepts of fair play. To hold otherwise would seem to permit the Commissioner to arrogate to himself the original power to legislate. If so vast a power can be accorded to an administrative official, the sanctity of a statute exists solely in its form, not in its substance. The statute itself would have to step aside for each whim entertained by a commissioner.

Regulations adopted by the Commissioner, with the approval of the Secretary of the Treasury, as authorized by law originally, are to be taken and accepted as reflecting the original Congressional intent, which is especially true where Congress, after the initial promulgation of the Regulations in question, has amended, extended or reenacted the statute which afforded the only basis for the Regulations, without altering or modifying, in any manner, the language of the statute as first construed by the Regulation.

Such regulations continuing under reenactment of a specific act are not subject to judicial disregard except for reasons of substance. In the case of *Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, v. Robert C. Winmill*, 305 U. S. 79 at page 83, it was said:

"Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.

"There has been tacit, if not express judicial approval for the administrative treatment of commissions as an element of the cost of securities."

See also *Thomas W. White et al, former Collector of Internal Revenue for the District of Massachusetts, Petitioner, v. Winchester Country Club*, 315 U. S. 32 at 41.

It is submitted, however, that the original regulations were consistent with the statute as originally created and as now existing. Such Regulations admitted of a precise and definite administration of the law. The law sought and still seeks to tax only that which is truly commercial. All other business activities were not merely exempt; they were not subjected to tax. The Regulations, simply for ease of definition, attempted to classify certain admitted non-commercial activities as not being covered by the taxing statute. In such classification it was recognized that "commercial phases" existing somewhere in every business activity, did not render taxable that which was not originally intended to be included for taxation. Among the specific activities recognized as being in the nature of non-commercial undertakings, was processing. Because the lexicographers and courts recognize milk pasteurization as a form of processing and because the courts have further determined that it partakes of industrial activities, rule changes are now attempted which will change a practical result, though not

altering fundamental concepts. Such a change is one which should only be made by Congress.

It is noteworthy that, when the tax was still one imposed upon the purchaser of electrical energy, the activity on behalf of the Government was not confined to carefully preserving in the regulations the distinction between, on the one hand, commercial activities, and on the other, non-commercial functions, inclusive of processing. It was at this time that the following ruling, which though subsequently changed, was issued which clearly recognized the inherent nature of milk pasteurization as an industrial process by direct language:

S. T. 518 Internal Revenue Bulletin XI "1. Cum. Bull. 11-2 page 498, October 7, 1932.

"Electrical energy furnished for consumption by bottling works, milk companies, or creameries engaged in the pasteurization and bottling of milk and in manufacture of butter, buttermilk, chocolate milk, and cottage cheese is not furnished for domestic or commercial consumption and is not subject to the tax imposed by Section 616 of the Revenue Act of 1932. However the use of electrical energy in branch offices or agencies of such industries is a commercial use and electrical energy so used is subject to the tax."

Though such last quoted ruling might be informally cast aside with the same apparent facility with which the Commissioner has taken action of denial in the instant case, the Regulations are promulgated on a higher and more dignified plane, "with the approval of the Secretary" (Sec. 3450 of Internal Revenue Code) and may not be arbitrarily and summarily changed nor disregarded. This is especially true where they have received implied Congressional approval as occurs when Congress reenacts an existing statute.

The Regulations have sought to preserve the distinction between commercial and non-commercial undertakings not alone by means of using the device of an express definition

but also by recognizing that even industrial enterprises will have a "commercial" phase, the existence of which, however, cannot have the office of determining the inherent nature of the type of pursuit being inquired into. If such were not the case, the production of all commodities for ultimate sale would be declared commercial in nature and the intention of Congress thereby defeated. In the field of business enterprise, Congress intended to include *only* commercial undertakings within the scope of the tax. Industrial and other non-commercial activity was not left in such position that it might be capable of winning an exemption only by the use of requisite proof. It was simply not covered by the tax.

Section 316.190 of Treasury Regulations 46 (Appendix, page 54), following the statutory pattern, contains an introductory statement singling out for taxability all energy sold for domestic or commercial consumption except as otherwise provided, and thereafter details certain categories of use which are admittedly neither domestic nor commercial. Thereafter, the Regulation recognizes that certain commercial or domestic "phases" may exist at a given location as a part of an enterprise which would not generally be subject to tax, stating:

"* * * However, electrical energy is subject to tax if sold for consumption in commercial phases of industrial or other business, such as in office buildings, sales and display rooms, retail stores, etc., or in domestic phases, such as in dormitories or living quarters maintained by educational institutions, churches, charitable institutions, or others."

Finally, the Regulation directs inquiry, independently of the over-all undertaking of the customer, into the predominant function carried on at the *location of consumption*, declaring:

"Where electrical energy is sold to a consumer for

two or more purposes, through separate meters, the specific use for which the energy is sold through each meter, i.e., whether for domestic or commercial consumption, or for other use, shall determine its taxable status. Where the consumer has all the electrical energy consumed at a given location furnished through one meter, *the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of this tax.*"

The Circuit Court of Appeals in the instant case, in adopting the finding of fact and opinion of the District Court, determined the issue of taxability by stating the governing principle of law to be:

"* * * The incidence of the tax did not depend upon the particular operation in which the energy was used, but upon the business of which it formed a part, and that since the predominant business of the dairies was that of fluid milk dealers and distributors, the electricity sold to the dairies by plaintiff was sold for commercial consumption." (R. 167)

Assuming that historically the present dairy plant bears some relation to the early milk routes along which raw milk was sold and that there are still in existence dealers in raw milk, the dairy plants consuming the electrical energy furnished by the petitioner should not be governed by such analogy merely because the product sold in all enterprises compared can be classified as milk, or because all of the undertakings have had a commercial phase.

Results not contemplated by the Regulations could reasonably be expected to follow if the language of the Circuit Court of Appeals' decision represents the governing rule. From such language the classification of taxability would be dependent upon the consumer's business as an entirety rather than upon the nature of the consumption at each separately metered location. Thus, in the case of an enterprise clearly industrial in character, such as that of a large steel producer, energy consumed would be presumably non-taxable even though supplied at a location such as an office

building where commercial activities were predominant. On the other hand, energy supplied to a textile mill, owned by a chain store organization which sold at various retail stores the entire output of the mill, would become taxable as commercially consumed energy utilized by a predominantly commercial undertaking. Both of such results, while in accordance with the language of the court decision, would seem to be contrary to the concepts of the Regulation.

Moreover, the language of the decision from the Seventh Circuit, which places extreme emphasis upon the commercial phase of a dairy, could logically be employed to extend the Act so as to operate upon a factual situation never intended by Congress to be taxable and not comprehended by the Regulations as commercial. Thus, should one of the Wisconsin dairies in question own and maintain its own herd of cattle at a location naturally removed from the dairy plant, own either directly or indirectly an electrical distribution system from farm to pasteurization plant, own a bottle manufacturing plant separately located, and own a geographically separated ice manufacturing plant, all of which facilities were entirely used by the dairy in the furtherance of its business of supplying pasteurized milk to others, and should each be separately metered, the language of the decision would be sufficiently extensive to render each of the separate pursuits a taxable function. Certainly, the Regulations do not purport to extend the law to such limits.

III.

The Predominant Character of the Activities of a Dairy Plant Is Industrial Processing Rather Than Commercial.

The Circuit Court of Appeals confirmed the determination and adopted the opinion of the District Court to the effect that dairies are primarily commercial institutions

and, therefore, a sale of electrical energy to them was held to be a taxable incident. The District Court arrived at this holding because it concluded that the business of dairies was "predominantly that of fluid milk dealers and distributors." In expanding the reasoning the Court said:

"It seems quite clear that a dairy which does not pasteurize its milk conducts a commercial business. The fact that some dairies do pasteurize their milk does not thereby change the business from commercial to industrial." (R. 143)

Although, as pointed out by the District Court, milk routes still exist whereby raw milk is offered to a customer, such circumstance does not characterize the instant dairy plants as being, through the affinity of relationship, commercial in nature. The instant record demonstrates that pasteurization is a technical procedure requiring precise handling of specially constructed machinery. The resulting product is in fact chemically different than raw milk. Where the art of pasteurization is employed, all portions of the plant are coordinated and in a large measure dependent upon the working of the pasteurization equipment. Pasteurization plants are generally large in capacity compared to raw milk plants because in this manner the relatively high investment in pasteurizing machinery may be economically utilized (R. 69).

The dairy plants whose operations give rise to the questions to be decided by the Court varied considerably in their relative size or the extent of their several operations. Whether they were large or small, however, the common denominator of all was the use of specialized machinery and the product processed, in the main, fluid milk. Perhaps the smallest operation reviewed was the Rolland J. Ruby plant (Exhibit K, R. 40) where 80% of the milk received was produced on the farm where the plant was located with the remainder acquired through purchase. The importance

of the pasteurization is illustrated by the practice of this modest establishment, in that all but 5% of the milk sold is pasteurized. If pasteurization were not such an important activity, even though the operation in the case of the Ruby plant is relatively small when compared to the large dairy plants, the milk handled (3,000 pounds per day, of which 2,400 was locally produced) would most likely be sold as raw milk to some larger plant for processing and distributing. This plant was certainly organized for processing, and except for size, its operations are similar to those of a plant of large productive capacity. The operation of the plant is a predominant portion of the business.

Except to the extent that the nature of pasteurized milk may determine the main issue one way or the other, there is no substantial commercial activity at the plant on the part of any of the dairies whose operations are presently involved. They either sell products wholly processed by themselves or, in one or two instances, sell mainly such products with a nominal amount of sales of products which they purchase for resale.

In the instant case, despite the determination of the courts below that the dairies were commercial institutions, the commercial aspects of the business were primarily carried on away from the premises where the electrical energy was consumed. Thus, Finding of Fact number eight states:

"8. For all the operations described in the preceding paragraph hereof, each dairy maintains a fleet of trucks and other vehicles and drivers. In most cases, the drivers have standing orders to deliver specified amounts of milk each day. In other cases, the amounts are specified at the time of delivery. The drivers also collect for the milk delivered, obtaining payment from some customers in advance for the milk, from some at the time of delivery, and from some by the week."
(R. 139)

A portion of Finding of Fact number seven, which further demonstrates that the commercial activities of the dairies are not carried on at the plants, states:

"* * * Except as retail or wholesale depots are maintained, or as deliveries are made to stores, each of the dairies delivers its milk and other dairy products directly to consumers by use of the horse-drawn vehicles and trucks." (R. 149)

The opinion of the District Court also recognizes that the commercial activities were pursued by the dairies away from their plant locations (R. 141). The exhibits attached to the Stipulation of Facts (R. 19-48) show in detail that the plants are not the locations of commercial sales. In only one instance are there any direct sales on the premises where in the case of a small dairy the stipulation states:

"A retail store maintained in the front of the plant building sells about 25 per cent of the ice cream and a very small per cent of the milk pasteurized and bottled." (Exhibit 1, R. 33.)

On the other hand, in the instance of at least one large dairy, the stipulation recites, "This company also has three distribution branches at other locations in the city, for which no exemption from tax is claimed, and a part of each day's output of this plant is delivered to these three distribution branches after being bottled or packaged" (Exhibit E, R. 121).

Under the law and under the Regulations, it is legally immaterial that the dairy plants also manage milk delivery routes. Such necessary "commercial phases" of their activities do not make these plants commercial in nature. The design to process milk by pasteurization to enable it to have a higher economic value does not reduce the whole activity to one of merely buying and selling or exchanging goods. Moreover, in a true and realistic sense, the activities of the milk routes, except as to the original loading of the vehicles,

take place outside of the location of the plant. The predominant character of the business carried on at the location of the plant is not the sale of milk but is industrial processing in the form of pasteurization.

The humble beginnings of the dairy industry in the peddler milk route should not be permitted to wholly determine the instant issue. Many other admittedly industrial pursuits now employing advanced technological skill and complex machinery once had their origin in directly satisfying the wants of a few customers. For example, it seems beyond any question of dispute that the manufacture of shoes is an intricate industrial function, the primary objective being to make shoes to sell. Before the advent of shoe machinery, however, the shoemaker, employing only a few small hand tools, was able to turn out a product for his customers. Firearms, which are now made through the use of precision machinery, were once made by the hand artisan. It may be that in both examples, instances still exist where a highly specialized craftsman may turn out either firearms or shoes for specialized customers. The majority of our present industrial undertakings sprang from humble beginnings but they are nonetheless industrial even though a product in some respects similar to that produced by the large manufacturers could be made by hand and sold directly to a few customers. Instances have not been unknown wherein a seller has offered a product for sale which has been assembled by him wholly out of prefabricated parts which he has purchased under contract. Such assembler is nonetheless engaged in an industrial pursuit in the same manner as is his competitor who manufactures the majority of the parts embodied in the finished article. Nor is there any true distinction in the fact that some products produced by industry are consumer goods, whereas others are durable or capital goods. Technological processes and com-

plex machinery may be employed for the production of both types of commodities.

The District Court concluded that its determination would be contrary to that of the case of *United States v. Public Service Co. of Colorado* (10th Circuit), 143 F. (2d) 79, and particularly with the pronouncement therein to the effect that:

"The electrical energy was not used in the commercial phase of the dairying enterprise, but in the processing or industrial phase of the enterprise."

The District Court concluded that the *Colorado* case had been erroneously decided and, accordingly, refused to recognize it as authoritative. Having determined from the reasoning employed that the predominant nature of the business of dairies was commercial, the District Court then concluded on the authority of the case of *St. Louis Refrigerating and Cold Storage Co. v. United States*, 43 F. Supp. 476, that all electrical energy furnished should be regarded as taxable. It is now submitted, however, that such case is not an answer to the instant situation. The figures inherent in that case are set forth at page 479 thereof and clearly show the commercial aspect of the business there being considered. Moreover, in special finding of fact No. 20 the letter of the Commissioner is included wherein the Commissioner asserted the taxability of electrical energy because it was "not used in manufacturing or processing articles of commerce," the entire excerpted portion of such finding at page 480 being:

"October 3, 1932, the Commissioner wrote the New York State Association of Refrigerated Warehouses, in reference to the electrical energy tax, in part as follows:

"You are advised that the question of the taxable status of electrical energy which is furnished to public cold storage warehouses has been reconsidered and the

Bureau is now of the opinion that the consumption of electrical energy in operating compressors in the manufacture of refrigeration for storage purposes is commercial in scope, *since such energy is not used in manufacturing or processing articles of commerce*, and, therefore, is subject to the tax imposed by the above-named section (Sec. 616).” (Italics supplied)

Although the Treasury Department has evolved what is characterized as the “gross receipts test” to determine the relative magnitude of commercial activity, such rule of thumb does not solve the present issues. The test calls for the ascertainment of the amount of gross revenue derived from the several activities, and if those which are clearly commercial predominate in the production of such revenue, the entire undertaking is thought to be commercial in nature. Under this pattern, the sale of pasteurized milk constitutes the source of most of the gross revenues of each of the dairy plants, and unless the nature of pasteurized milk is such that its sale renders a plant wholly commercial in nature, the taxpayer must prevail.

Over objection, Mr. Manning, an Internal Revenue Agent, was permitted to testify on behalf of the respondent concerning the alleged applicability of “the gross receipts method” as a means of ascertaining whether or not electrical energy sold to a dairy was taxable. His testimony in this respect may be summed up by the following answer:

“A. We would ascertain the quantity of sales of manufactured products and the amount of sales of fluid milk and whichever was larger would determine the taxability of the account.” (R. 117)

The scope of the application of such test, in reference to pasteurized milk, was demonstrated by the following question and answer:

“Q. Now, when you speak of the gross receipts test and use fluid milk precisely, you assume that in that thinking so far as you are doing the approach to the

matter, that regardless of what took place in the pasteurizing vat ~~that entire commodity or product is,~~ nevertheless, still a product similar to what it would be were it to be sold as raw milk?

"A. That is right." (R. 118)

Nowhere in the law, nor for that matter within the permissible scope of the Regulations is there any such justification for completely ignoring the true nature of the process of pasteurization. Pasteurization in the modern dairy is much more than a mere incidental and casual activity. It is the central activity around which turn the other activities of the pursuit. The other operations of the dairy plant, such as cream separating, the rendition of by-products and the bottling of the milk itself must be functionalized and synchronized to the pasteurization machinery.

While it may not be determinative of the present issue to consider whether or not Treasury Department rulings have been consistent in determining which functions and enterprises are predominantly commercial in nature because only an imperfect basis of comparison is thereby permitted, nevertheless, there are some activities which have a much higher commercial connotation than a dairy plant which have been held to be non-commercial (Appendix, page 54-55).

The District Court in attempting to view the problem from the standpoint of legislative intent quotes from remarks made by Senator Harrison as a member of the Senate Finance Committee in a discussion concerning a proposed revision in 1933 in which he said:

"I am telling the Senators nothing new when I remind them that we had a fight here in 1932 over the imposition of this tax. The Senate imposed a three per cent electric energy tax, and it was finally adopted, to be collected from the consumer of electric energy. We applied that only on domestic and commercial energy; that is, electric energy used in stores and dwellings that are classified as commercial and domestic. There

was no tax in the 1932 act imposed upon energy employed in industry." (R. 144) (Italics supplied) (77 Congressional Record, Part 3, p. 3212-3213)

Senator Reed also commented along the same general lines when he indicated that electrical energy sold for commercial use as well as domestic, "means that we shall get a revenue out of electricity sold to shops and offices and places of that sort" (75 Congressional Record, Part 10, page 11608).

From the remarks of both senators, it would seem that at least one objective of the proposed legislation was to exclude all productive and industrial consumption from being included as a taxable transaction without regard to whether or not manufacturing was technically involved. The intention seems to have been to use the term "commercial consumption" in its generally accepted meaning, namely, for uses which are clearly associated with the idea of trade, such as buying, selling and exchanging. "Stores" and "shops and offices and places of that sort" were specifically mentioned in the discussions. The only "store" of a dairy plant is the delivery wagon. In this respect, its plant is a place for the preparation of the product which later goes into the wagon. All operations conducted within the plant are necessary in the preparation of a finished product for market. The receiving and handling of milk can be compared to the receipt and handling of iron ore by the steel industry. The use of machinery in a pasteurization plant is a reality and a recognized chemical change takes place in the milk as the result of a physical and mechanical process. There is no basis in the statute, as indicated by its language or legislative history, to determine that a dairy plant is a commercial plant because the industry of which it is a part had its beginnings in the sale of milk in the same form as when received from the herd, nor because the present art

of pasteurization is employed for the rendition of a product for direct use by the consumer. The present industry is distinguishable only in degree, if at all, from the oil industry where crude oil is refined by a company to be placed directly in its own filling stations for sale to the motorist. It is true that the medium of transportation may intervene between these two steps, but where oil is transported long distances by pipe lines under the control of the same company, the parallel becomes more apparent.

CONCLUSION

The true nature of pasteurization has been amply developed upon a factual basis in the instant record. The facts are in accord with those which have been developed in other cases wherein the nature of the process has received judicial inquiry. The characterization of the industry as one devoted wholly to a commercial activity is based upon the premise that the product which is merchandized *resembles* milk in its natural state. Even if there was no change in the product except imparting pathogenic sterility thereto, accomplished through plant operations, the product sold could not be truly said to be the same as that acquired in its raw state. In addition, however, pasteurization effects a certain chemical change. Dairy plants are not engaged in such activities as were intended by Congress to be classified as commercial, but were in fact industrial processing plants whose functions were not calculated by Congress to be subjected to economic discrimination because of the chance circumstance of their either obtaining purchased power or power developed in their own plants.

Those functions which are carried on within a plant should be distinguished from activities pursued beyond the confines of such plant. The Regulations recognize the need for such a distinction. Unless such differentiation is pre-

served, the application of both the Regulations and the Act will be extended in an unauthorized manner to situations not originally within Congressional contemplation.

The petitioner is entitled to recover back the amount of tax paid by it on the sales of electrical energy to the dairy plants and respectfully requests a reversal of the judgment entered against it in the Circuit Court of Appeals for the Seventh Circuit.

Respectfully submitted,

VAN B. WAKE,
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Wisconsin Electric Power Company.

APPENDIX

Internal Revenue Code:

Sec. 3411. Tax on Electrical Energy for Domestic or Commercial Consumption.

(a) There shall be imposed upon electrical energy sold for domestic or commercial consumption and not for resale a tax equivalent to $3\frac{1}{3}$ per centum of the price for which so sold, to be paid by the vendor under such rules and regulations as the Commissioner, with the approval of the Secretary, shall prescribe. The sale of electrical energy to an owner or lessee of a building, who purchases such electrical energy for resale to the tenants therein, shall for the purposes of this section be considered as a sale for consumption and not for resale; but the resale to the tenant shall not be considered a sale for consumption.

* * *

(26 U.S.C. 1940 ed., Sec. 3411) (26 U.S.C.A. 3411)

Section 3411 (a) was amended by the Revenue Act of 1941, c. 412, 55 Stat. 687, Sec. 521 (a) (19), to change the three per cent tax to three and one-third per cent but left the section otherwise the same.

Revenue Act of 1932, c. 209, 47 Stat. 169:

Sec. 616. Tax on Electrical Energy.

(a) There is hereby imposed a tax equivalent to 3 per centum of the amount paid on or after the fifteenth day after the date of the enactment of this Act, for electrical energy for domestic or commercial consumption furnished after such date and before July 1, 1934, to be paid by the person paying for such electrical energy and to be collected by the vendor.

* * *

Act of June 16, 1933, c. 96, 48 Stat. 254:

Sec. 6 (a) Effective September 1, 1933, section

616 of the Revenue Act of 1932 is amended to read as follows:

Sec. 616. Tax on Electrical Energy for Domestic or Commercial Consumption.

(a) There is hereby imposed upon electrical energy sold for domestic or commercial consumption and not for resale a tax equivalent to 3 per centum of the price for which so sold, to be paid by the vendor under such rules and regulations as the Commissioner, with the approval of the Secretary, shall prescribe. The sale of electrical energy to an owner or lessee of a building, who purchases such electrical energy for resale to the tenants therein, shall for the purposes of this section be considered as a sale for consumption and not for resale, but the resale to the tenant shall not be considered a sale for consumption.

Treasury Regulations 42, promulgated under the Revenue Act of 1932:

Art. 40. Scope of tax.—The tax applies to the amount paid for all electrical energy furnished for domestic or commercial consumption, either by a privately or publicly owned operating electrical power company.

“Electrical energy for domestic or commercial consumption” includes all electrical energy furnished the consumer except electrical energy furnished for industrial consumption. Electrical energy for industrial consumption includes that used generally for industrial purposes, that is, in manufacturing, processing, mining, refining, irrigation, shipbuilding, building construction, etc., and by public utilities, waterworks, telephone, telegraph, and radio companies, railroads, and other common carriers.

The tax attaches to all amounts paid for electrical energy for domestic or commercial consumption irrespective of whether any of the energy paid for is actually used. In other words, the tax is due on all payments for electrical energy whether in the form of a minimum charge, a flat charge, or otherwise.

T. D. 4393, XII-2 Cum. Bull. 322 (1933):

Section 616 of the Revenue Act of 1932 was amended by section 6 (a) of the Act of Congress approved June 16, 1933 (Public, No. 73, Seventy-third Congress). In conformity with the law as so amended, Chapter V of Regulations 42, approved October 22, 1932, is amended, effective with respect to electrical energy sold on or after September 1, 1933, to read as follows:

Art. 39. *Effective period.*—The tax applies to electrical energy sold on or after September 1, 1933, and before July 1, 1935.

Art. 40. *Scope of tax.*—The tax is imposed upon electrical energy sold for domestic or commercial consumption and not for resale, except as provided hereinafter.

The term "electrical energy sold for domestic or commercial consumption" does not include (1) electrical energy sold for industrial consumption, e.g., for use in manufacturing, processing, mining, refining, shipbuilding, building construction, irrigation, etc., or (2) that sold for other uses which likewise can not be classed as domestic or commercial, such as the electrical energy used by public utilities, waterworks, telegraph, telephone and radio communication companies, railroads, other common carriers, educational institutions not operated for profit, churches, and charitable institutions. However, electrical energy is subject to tax if sold for use in the commercial phases of industrial or other businesses, such as in office buildings, sale and display rooms, retail stores, etc.

Where electrical energy is sold to a single consumer for two or more purposes, through separate meters, the specific use for which the energy is sold through each meter, i.e., whether for domestic or commercial consumption, or for other use, shall determine its taxable status. Where the consumer has all the electrical energy used at a given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of this tax.

Treasury Regulations 46 (1940 ed.) :

Sec. 316.190 (as amended by T. D. 5099, 1941-2 Cum. Bull. 267). *Scope of tax.*—The tax imposed by section 3411 (a) of the Internal Revenue Code, as amended, applies, except as provided hereinafter, to all electrical energy sold for domestic or commercial consumption and not for resale.

The term "electrical energy sold for domestic or commercial consumption" does not include (1) electrical energy sold for industrial consumption, e.g., for use in manufacturing, mining, refining, shipbuilding, building construction, irrigation, etc., or (2) that sold for other uses which likewise can not be classed as domestic or commercial, such as the electrical energy used by electric and gas companies, waterworks, telegraph, telephone, and radio communication companies, railroads, other similar common carriers, educational institutions not operated for private profit, churches, and charitable institutions in their operations as such. However, electrical energy is subject to tax if sold for consumption in commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc., or in domestic phases, such as in dormitories, or living quarters maintained by educational institutions, churches, charitable institutions, or others.

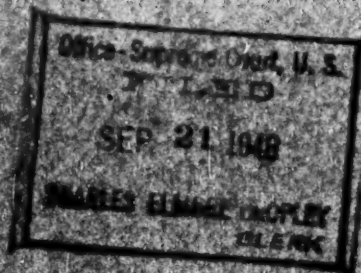
Where electrical energy is sold to a consumer for two or more purposes, through separate meters, the specific use for which the energy is sold through each meter, i.e., whether for domestic or commercial consumption, or for other use, shall determine its taxable status. Where the consumer has all the electrical energy consumed at a given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of this tax.

• • •

ACTIVITIES WHICH HAVE BEEN RULED AS NON-COMMERCIAL IN NATURE AND HENCE NON-TAXABLE (Prentice-Hall, Federal Tax Service, 1948, Vol. 3, paragraph 38746).

- Bottling works (S. T. 518, C. B. Dec. 1932, p. 498).
- Cleaners and Dyers—except branch offices and agencies (informal ruling No. 45 by Bureau of Internal Revenue, August 10, 1932).
- Closed Industrial Plants—Electric energy to an industrial plant for consumption during a period of time when its industrial activities have temporarily ceased for the purpose of maintaining or protecting the plant is not furnished for domestic or commercial consumption. (S. T. 641, C. B. June 1933, p. 410.)
- Dairies engaged in the manufacture and sale of butter and cheese. (S. T. 637, C. B. June 1933, p. 409.)
- Laundries (S. T. 463, C. B. Dec. 1932, p. 496).
- Meat Packing company branches (S. T. 525, C. B. Dec. 1932, p. 499).
- Grain elevators—Though commercial elevators are usually taxable, electrical energy consumed in a grain elevator for purposes of cleaning, drying, grinding and bleaching grain is considered industrial consumption and is not subject to tax. (S. T. 527, C. B. Dec. 1932, p. 499; G. C. M. 13315, C. B. Dec. 1934, p. 405.)
- Newspapers—printing of. Informal ruling by Bureau of Internal Revenue, July 29, 1932.
- Printing—non-taxable. Informal ruling No. 45 by Bureau of Internal Revenue, Aug. 10, 1932.

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SUPREME COURT, U. S.



No. 237

In the Supreme Court of the United States

OCTOBER TERM, 1948

WISCONSIN ELECTRIC POWER COMPANY, PETITIONER

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH
CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

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No. 237

WISCONSIN ELECTRIC POWER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEV-
ENTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 140-146) is reported at 69 F. Supp. 743. The opinion of the Court of Appeals (R. 166-168) is reported at 168 F. 2d 285.

JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1948. (R. 168.) The petition for a writ of certiorari was filed on August 21, 1948. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254.

QUESTIONS PRESENTED

Section 3411 (a) of the Internal Revenue Code taxes electric companies upon electrical energy sold for domestic or commercial consumption.

1. Does "commercial consumption" refer to the particular process in which the energy is used or does it refer to the nature of the business of the consumer to which the energy is sold, irrespective of the particular process in which it is used?

2. The District Court found and the Court of Appeals upheld the finding that sales of electrical energy to dairies which are principally fluid milk dealers were sales to commercial businesses and not to industrial businesses and hence held the energy was sold for commercial consumption. Should the sales of energy nevertheless be considered as being for other than commercial consumption if it can be found that a substantial part of the energy was used in pasteurization or bottling and similar preparations for the sale and delivery of the milk?

3. Is the decision of the Court of Appeals that the character of the consumption of the energy depends upon the nature of the consuming business contrary to Section 316.190 of Treasury Regulations 46, which provides that where energy consumed at a given location is furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of the tax?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 10-13.

STATEMENT

During the period April 1, 1940, to July 31, 1943, the petitioner supplied electrical energy to twenty-eight customers engaged in the dairy business in and around Milwaukee, Wisconsin. (R. 147.) Fifteen of the twenty-eight dairies were furnished the energy through more than one electric meter furnished by the petitioner; but in no instances were the separate meters so connected as to enable the energy supplied for one purpose or another in the operations of the dairy to be differentiated. (R. 14, 147-148.)

During this period the taxpayer paid \$6,806.84 in taxes on sales of energy to the twenty-eight customers, computed at the rate of three per cent to June 30, 1940, and three and one-third per cent thereafter. On May 25, 1944, the taxpayer filed with the proper Collector of Internal Revenue a claim for refund of these taxes on the ground that it had erroneously treated the sales of energy as sales for commercial consumption. The claim was rejected by the Commissioner of Internal Revenue on October 16, 1944. (R. 148.) This action was then brought on November 1, 1944. (R. 2.)

The District Court found that twenty-seven of the dairies are predominantly fluid milk dealers

and distributors.¹ (R. 152.) The twenty-seven operate in much the same way. They make contracts with farm producers for purchase of the milk daily and at other regular intervals, sometimes the producers delivering the milk to the dairies, sometimes the dairies supplying the trucks and drivers to pick it up. The dairies then weigh, test and mix the milk to obtain standard quality, pasteurize it, pour it in clean bottles and cans and keep the bottles and cans in cold storage rooms until the delivery men pick them up the same day or the following day. The dairies maintain fleets of trucks and horse-drawn vehicles and employ many drivers to deliver the milk daily and every other day to homes, restaurants, hotels and stores, in accordance with standing and specific orders.. (R. 149.)

The dairies pasteurize the milk with specifically designed equipment. The milk is heated to 143°-145° F., kept at that temperature for thirty minutes and then cooled rapidly down to 38°-40° F. The purpose of pasteurization is to kill pathogenic bacteria in the milk while staying within such tolerances as not to destroy the natural creaming properties of milk nor impart a scorched taste to it. (R. 150.)

¹ One of the dairies was found to be engaged predominantly in the manufacture of condensed and powdered skim milk and butter fat which it sold at wholesale throughout the United States. The District Court held therefore that sales of electrical energy to it were not for commercial consumption. (R. 148-149.)

Electrical energy is used by the dairies for lighting administrative offices, and garages, as well as the rest of the plant. It is also used to operate electric motors which pump refrigerants, deliver milk to and from pasteurizing vats and to bottling machines, operate cream separators, operate bottle washers and conveyers, operate homogenizers where the dairies have them, and perform similar functions. (R. 151.)

The District Court found that the distribution of milk has existed in the United States as a distinct form of business for nearly a century. Pasteurization of milk on a substantial scale was not established in this country until 1897. It came into use in Milwaukee in 1903, and by 1915 it was quite common practice. But even at the present time there are more raw milk plants in the United States than those which pasteurize their milk. In the cities of over one-thousand population in the United States, a majority of the milk dealers distribute unpasteurized milk; more than twenty-five per cent of all milk sold in such cities is not pasteurized. Two dairying experts testified at the trial that they had never heard of a dairy plant which pasteurized and bottled its milk which was not a distributor. (R. 149-150.)

It also found that while pasteurizing is an important part of the business of the dairies here involved, they likewise utilize systems of rapid regular distribution of fresh milk to their cus-

tomers, and maintain fleets of trucks, horse-drawn wagons and drivers, garages, loading and unloading facilities, weighing and testing devices, storage and refrigeration rooms, and machinery for putting milk into bottles at high speed. The record shows that pasteurization plays a minor part in the total business of the dairies. It utilizes only a small fraction of the total personnel, causes only a minor part of the capital investments and accounts for an insignificant part of the cost of operations. The investment of the dairies in pasteurizing equipment, including increased cooling equipment, is from fifteen-per cent to twenty per cent of the total cost of its plant equipment, but this percentage figure would be considerably smaller if the investment in such items as trucks and other vehicles, horses, bottles, cases, *et cetera*, were taken into consideration. Assuming the sale price of a quart of milk in Milwaukee at the time of trial was sixteen cents, the cost of the milk itself was 9.6 cents, the distribution in bottles about four cents, and the entire plant operations about one cent. About one-tenth of a cent of the cost of plant operations is attributable to pasteurization. The predominant business of the dairies involved is, and was, that of fluid milk dealers and distributors. The electricity sold to them by taxpayer, was sold for commercial consumption; it was sold and used in a commercial business. (R. 151-152.)

The District Court concluded as a matter of law that the incidence of the tax on electrical energy

does not depend upon the particular operation in which the energy is used but upon the business of which it forms a part. Since the predominant business of the twenty-seven dairies is, and was, that of fluid milk dealers and distributors, the electricity sold to them by the petitioner was sold for commercial consumption; it was sold and used in a commercial business. (R. 152-153.)

The Court of Appeals held that the findings of the District Court correctly set forth the controlling facts and applied the proper test of commercial consumption. And it adopted the opinion of the District Court as its own. (R. 167-168.)

DISCUSSION

The tax involved here is levied "upon electrical energy sold for domestic or commercial consumption." Internal Revenue Code, Section 3411 (a) Appendix, *infra*. In so limiting the tax it is assumed that Congress intended to exempt sales of energy for industrial consumption. *United States v. Public Service Co. of Colorado*, 143 F. 2d 79 (C. C. A. 10th); *St. Louis Refrigerating & Cold Storage Co. v. United States*, 43 F. Supp. 476, 484 (C. Cls.).

We believe the Court of Appeals correctly held that the proper test to be applied in determining whether the electrical energy used by a particular consumer falls within the term "commercial consumption" is whether the predominant character of the business enterprise carried on by the consumer is commercial, irrespective of the particular operations in which the energy is used. (R. 167.)

We believe it also correctly held that sales of energy to dairies, whose predominant business is that of fluid milk dealers and distributors, are sales to commercial consumers and hence for commercial consumption. (R. 167.) We further believe that the applicable Treasury Regulations (Appendix, *infra*) are not at variance with the decision. However, we recognize that the decision of the Court of Appeals on these questions is in conflict with the decision of the Court of Appeals for the Tenth Circuit on the same matter in the case of *United States v. Public Service Co. of Colorado*, *supra*. There the court applied as its test of commercial consumption the operations in which the electrical energy was used by the consumer, holding that because the electrical energy was used in pasteurization and related operations in milk dealing the sales of energy to the dairies were sales for industrial consumption.

There are pending in various District Courts and the Court of Claims fifty-three suits for refund of sums totaling more than \$260,000 involving the application of this tax to sales of electrical energy to dairies similar to those in the instant case and in the *Public Service Co. of Colorado* case, *supra*. There is also reason to believe that numerous other suits will be brought, as there have already been submitted to the Commissioner of Internal Revenue several hundred claims for refund involving the same problem. The tax with respect to sales of

energy to this type of consumer is presently not being collected in the Tenth Circuit but is elsewhere, although the nature of the consumption involved in the Tenth Circuit is not substantially different from that involved in the other circuits.

We believe a decision by this Court is necessary to clarify and resolve the conflict of principles applicable to the construction and application of this statute and to assure uniformity in the collection of the electrical energy excise tax.

CONCLUSION

For the foregoing reasons we do not oppose the petition in this case.

Respectfully submitted,

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SEPTEMBER 1948.

APPENDIX

Internal Revenue Code:

SEC. 3411. TAX ON ELECTRICAL ENERGY FOR DOMESTIC OR COMMERCIAL CONSUMPTION.

(a) There shall be imposed upon electrical energy sold for domestic or commercial consumption and not for resale a tax equivalent to 3 per centum of the price for which so sold, to be paid by the vendor under such rules and regulations as the Commissioner, with the approval of the Secretary, shall prescribe. The sale of electrical energy to an owner or lessee of a building, who purchases such electrical energy for resale to the tenants therein, shall for the purposes of this section be considered as a sale for consumption and not for resale, but the resale to the tenant shall not be considered a sale for consumption.

* * *

(26 U. S. C. 1946 ed., Sec. 3411.)

Section 3411 (a) was amended by the Revenue Act of 1941, c. 412, 55 Stat. 687, Sec. 521(a) (19), to change the three per cent tax to three and one-third per cent but left the section otherwise the same.

Treasury Regulations 42, promulgated under the Revenue Act of 1932:

Art. 39 [as amended by T.D. 4922, 1939-2 Cum. Bull. 363]. *Effective period.*—The tax applies to electrical energy sold prior to July 1, 1941.

Art. 40 [as amended by T.D. 4393, XII-Cum. Bull. 322 (1933)]. *Scope of tax.*—The

tax is imposed upon electrical energy sold for domestic or commercial consumption and not for resale, except as provided hereinafter.

The term "electrical energy sold for domestic or commercial consumption" does not include (1) electrical energy sold for industrial consumption, e.g., for use in manufacturing, processing, mining, refining, shipbuilding, building construction, irrigation, etc., or (2) that sold for other uses which likewise can not be classed as domestic or commercial, such as the electrical energy used by public utilities, waterworks, telegraph, telephone, and radio communication companies, railroads, other common carriers, educational institutions not operated for profit, churches, and charitable institutions. However, electrical energy is subject to tax if sold for use in the commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc.

Where electrical energy is sold to a single consumer for two or more purposes, through separate meters, the specific use for which the energy is sold through each meter, i.e., whether for domestic or commercial consumption, or for other use, shall determine its taxable status. Where the consumer has all the electrical energy used at a given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of this tax.

Treasury Regulations 46 (1940 ed.):

Sec. 316.190 [as added by T. D. 5099, 1941-2 Cum. Bull. 267]. *Scope of tax.*—The tax imposed by section 3411 (a) of the Internal Revenue Code, as amended, applies, except as provided hereinafter, to all electrical energy sold for domestic or commercial consumption and not for resale.

The term "electrical energy sold for domestic or commercial consumption" does not include (1) electrical energy sold for industrial consumption, e.g., for use in manufacturing, mining, refining, shipbuilding, building construction, irrigation, etc., or (2) that sold for other uses which likewise can not be classed as domestic or commercial, such as the electrical energy used by electric and gas companies, waterworks, telegraph, telephone, and radio communication companies, railroads, other similar common carriers, educational institutions not operated for private profit, churches, and charitable institutions in their operations as such. However, electrical energy is subject to tax if sold for consumption in commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc., or in domestic phases, such as in dormitories or living quarters maintained by educational institutions, churches, charitable institutions, or others.

Where electrical energy is sold to a consumer for two or more purposes, through separate meters, the specific use for which the energy is sold through each meter, i.e., whether

for domestic or commercial consumption, or for other use, shall determine its taxable status. Where the consumer has all the electrical energy consumed at a given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of this tax.

* * *

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Webster's New International Dictionary (Second ed., 1948, unabridged).....	10

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 237

WISCONSIN ELECTRIC POWER COMPANY, PETITIONER
v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 134-140) is reported at 69 F. Supp. 743. The opinion of the Court of Appeals (R. 157-159) is reported at 168 F. 2d 285.

JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1948 (R. 159). The petition for a writ of certiorari was filed on August 21, 1948, and granted on October 18, 1948 (R. 161). The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

The District Court found, and the Court of Appeals upheld the finding, that the predominant business of each of twenty-seven dairies to which the taxpayer furnished electrical energy was that of a fluid milk dealer and distributor, that the business was "commercial" in nature, and that pasteurization of milk by the dairies was only an incidental part of that business.

The question presented is whether the courts below correctly held that sales of electrical energy to these dairies for use in their plants, including the undetermined part of such energy used in pasteurization, were sales for "commercial consumption" within the meaning of Section 3411 (a) of the Internal Revenue Code.

STATUTES AND OTHER AUTHORITIES INVOLVED

The statutes and other authorities involved are set forth in the Appendix, *infra*, pp. 58-68.

STATEMENT

The pertinent facts, taken from the stipulation of the parties (R. 7-44) and the findings of the District Court (141-146), are as follows:

During the period April 1, 1940, to July 31, 1943, the taxpayer supplied electrical energy to twenty-eight customers engaged in the dairy business in and around Milwaukee, Wisconsin. (R. 13, 141.) Fifteen of the twenty-eight dairies were furnished the energy through more than one elec-

tric meter, provided by the taxpayer; but in no instances were the separate meters so connected as to enable the energy supplied for one purpose or another in the operations of the dairy to be differentiated. (R. 13, 141-142.)

During this period the taxpayer paid \$6,806.84 in taxes on sales of energy to the twenty-eight customers, computed at the rate of three per cent to June 30, 1940, and three and one-third per cent thereafter. On May 25, 1944, the taxpayer filed with the proper Collector of Internal Revenue a claim for refund of these taxes on the ground that it had erroneously treated the sales of energy as sales for commercial consumption. The claim for refund was rejected by the Commissioner of Internal Revenue. (R. 142.)

The District Court found that twenty-seven of the dairies are predominantly fluid milk dealers and distributors.¹ (R. 146.) The twenty-seven operate in much the same way. They make contracts with farm producers for purchase of the milk daily and at other regular intervals, sometimes the producers delivering the milk to the dairies and sometimes the dairies supplying the trucks and drivers to pick it up. The dairies

¹ One of the dairies, Pabst Farms, was found to be engaged predominantly in the manufacture of condensed and powdered skim milk and butter fat which it sold at wholesale throughout the United States. The District Court held therefore that sales of electrical energy to it were not for commercial consumption. (R. 142-143.) No issue is here raised with respect to that dairy.

then weigh, test and mix the milk to obtain standard quality, pasteurize it, pour it in clean bottles and cans and keep the bottles and cans in cold storage rooms until the delivery men pick them up the same day or the following day. The delivery men cover definite territories or routes each day, delivering the milk to regular customers, including homes, restaurants, hotels and stores, daily and every other day in accordance with standing and specific orders. (R. 143-146.)

The dairies pasteurize the milk with specifically designed equipment. The milk is heated to 143° to 145° F., kept at that temperature for about thirty minutes and then cooled rapidly down to 38°-40° F. The purpose of pasteurization is to kill pathogenic bacteria in the milk while staying within such tolerances as neither to destroy the natural creaming properties of milk nor impart a scorched taste to it. (R. 144-145.)

Electrical energy is used by the dairies for lighting administrative offices and garages, for the collecting and distributing trucks as well as the rest of the plants. It is also used to operate electric motors which pump refrigerants, deliver milk to and from pasteurizing vats and to bottling machines where pumps are necessary, operate bottling machines, operate bottle washers or sterilizers and conveyors, operate cream separators, operate homogenizers where the dairies have them, and perform similar functions. The larger dairies differ from the smaller ones chiefly

in the number of units available for different operations, such as a larger number of pasteurizing vats, more bottling machines, etc. (R. 145.)

The District Court found that the distribution of milk has existed in the United States as a ~~distinct~~ ^{distinct} form of enterprise for nearly a century. Pasteurization of milk on a substantial scale was not established in this country until 1897. It came into use in Milwaukee in 1903, and by 1915 it was quite common practice. But even at the present time there are more raw milk plants in the United States than those which pasteurize their milk. In the cities of over one-thousand population in the United States, a majority of the milk dealers distribute unpasteurized milk; more than twenty-five per cent of all milk sold in such cities is not pasteurized. Two dairying experts testified at the trial that they had never heard of a dairy plant which pasteurized and bottled its milk, which was not a distributor. (R. 143-144.)

It also found that while pasteurizing is an important part of the business of the dairies involved in the case, they likewise utilize systems of rapid regular distribution of fresh milk to their customers, and maintain fleets of trucks, horse-drawn wagons and drivers, garages, loading and unloading facilities, weighing and testing devices, storage and refrigeration rooms, and machinery for putting milk into bottles at high

speed. It found that the record showed pasteurization plays a minor part in the total business of the dairies. It utilizes only a small fraction of the total personnel, causes only a minor part of the capital investments and accounts for an insignificant part of the cost of operations. The investment of the dairies in pasteurizing equipment, including increased cooling equipment, is from fifteen per cent to twenty per cent of the total cost of their plant equipment, but this percentage figure would be considerably smaller if the investment in such items as trucks and other vehicles, horses, bottles, cases, etc., were taken into consideration. Assuming the sale price of a quart of milk in Milwaukee was sixteen cents, the cost of the milk itself was 9.6 cents, the distribution in bottles about four cents, and the entire plant operations about one cent. About one-tenth of a cent of the cost of plant operations is attributable to pasteurization. The predominant business of the dairies involved is, and was, that of fluid milk dealers and distributors. The electricity sold to them by the taxpayer was sold for commercial consumption; it was sold and used in a commercial business. (R. 146.)

The District Court concluded as a matter of law that the incidence of the tax on electrical energy did not depend upon the particular operation in which the energy was used but upon the business of which it formed a part. Since the

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predominant business of the twenty-seven dairies is, and was, that of fluid milk dealers and distributors, the electricity sold to them by the petitioner was sold for commercial consumption; it was sold and used in a commercial business. (R. 147.)

The Court of Appeals held that the findings of the District Court correctly set forth the controlling facts and applied the proper test of commercial consumption. And it adopted the opinion of the District Court as its own. (R. 157-159.)

SUMMARY OF ARGUMENT

I

The tax at issue here is levied upon electrical energy sold for domestic or commercial consumption. "Commercial" has varied meanings, connoting in its narrowest sense buying and selling and in its broadest sense every phase of business activity. On its face the statute appears to use the term in a broad sense. And the electric industry classifications of consumers submitted to Congress at hearings when the tax was first considered in 1932 show that the industry used the term to cover substantially all business consumption.

II

The legislative history of the statute shows, however, that Congress intended to exempt from the tax on consumption by businesses, consumption

in industry. In this latter category it appears that Congress generally intended to include manufacturing and heavy industry, businesses in which electrical energy is commonly understood to be used in very substantial quantity as a source of power in manufacturing and in which differences in the cost of energy, even as small as the three percent tax, would be likely to have an important effect upon the cost of operation of the entire business and its ability to withstand the competition of businesses producing their own untaxed electrical energy.

III

Contemporaneously with the first enactment of the law in 1932, the Treasury construed the statute in accordance with the legislative intent. It gave the phrase "commercial consumption" a broad meaning in its Regulations covering all business consumption other than industrial, and by public utilities, and not merely buying and selling activities. And its rulings on specific cases likewise followed the same view. In one ruling in 1933 it expressly held that dairies obtaining milk and converting it into use for retail purposes are commercial in character and therefore their consumption of energy is commercial. Congress has never disapproved the Treasury's construction of the law. And the few reported cases show that the electric utilities have generally acquiesced in the Treasury's contemporaneous construction and applications.

An operation or activity which is a normal integral incident of a commercial business may not be characterized as industrial merely because, viewed in isolation, it does not constitute buying or selling. To interpret the statute so narrowly would be to nullify the tax on commercial consumption, since even in buying and selling businesses (although we submit Congress did not intend to confine commercial consumption merely to such businesses) electricity is used only as an incident of the business, for light, heat or power.

The portion of the Regulations dealing with two different uses of energy by the same consumer is intended to refer to consumers in two types of business and to industrial consumers having separated sales organizations, consuming energy through separate meters, problems which the statute does not resolve. It is not intended to narrow the meaning of the statute.

IV

The application of every reasonable test to determine the character of the fluid milk dealing business shows it to be commercial. They maintain and operate an effective daily distribution service between many producers and many consumers for a fresh clean food product readily subject to spoilage.

Pasteurizing the milk, which is a process of heating and cooling to destroy possible harmful

bacteria, is merely an incident of fluid milk dealing adopted in businesses already existing for many years and still not adopted by the majority of milk dealers. It is ordinarily not engaged in independently of such businesses. The cost of pasteurizing is relatively insignificant, it requires only a relatively small part of the milk handling and distributing personnel, and the investment in pasteurizing equipment is relatively small when compared to its distributing equipment. Though it may be called a "process", like many other processes it is still an incident of a commercial business and does not make the fluid milk dealers manufacturers or put them in industry. The courts below therefore properly held the sales of energy to the dairies were for commercial consumption.

ARGUMENT

I

INTRODUCTION

Section 3411 (a) of the Internal Revenue Code (Appendix, *infra*) imposes an excise tax "upon electrical energy sold for domestic or commercial consumption" to be paid by the vendor.

The statute provides no definition for "commercial".

"Commercial" is not a word of art; and dictionary definitions would support a very broad and comprehensive interpretation. See, e. g., Webster's New International Dictionary (Second

ed., 1948, unabridged). And this Court has noted that while "commerce" or "commercial" may possibly be used in a narrow sense to mean only "the purchase and sale or exchange of goods and commodities", it may also include, unless the context indicates otherwise, "other occupations and other recognized forms of business enterprise which do not necessarily involve trading in merchandise"; "in a broad sense it embraces every phase of commercial and business activity and intercourse". *Jordan v. Tashiro*, 278 U. S. 123, 127-128; *United States v. Underwriters Assn.*, 322 U. S. 533, 551. And cf. *St. Louis Refrigerating & Cold S. Co. v. United States*, 43 F. Supp. 476, 484 (C. Cls.).

If we took only the words of the statute, it would appear that Congress intended "domestic or commercial consumption" to cover the entire field of consumption of electrical energy, since it found it necessary to make express exception in Section 3411 (c) (Appendix, *infra*) for electrical energy sold to the United States, or to any state or territory, or political subdivision thereof, or the District of Columbia.

Moreover, if the meaning of the term "commercial" were sought from its usage in the industry upon which the law has its main impact, namely, the electric utility industry, at the time the law was first enacted, an extremely broad meaning of the term would have to be adopted. The statutory language was first enacted in Section 616 of the Revenue Act of 1932, c. 209, 47 Stat. 169

(Appendix, *infra*). Prior to the drafting of the law, hearings were held in which a representative of the association of all electric light and power companies was invited to testify. Hearings before the House Ways and Means Committee, 72nd Cong., 1st Sess., pp. 1159-1181. The classification of their customers submitted by the companies included in "commercial" all but domestic, municipal, public utilities and a small number of miscellaneous consumers. (p. 1167). And the data taken by a Federal Trade Commission witness from an industry magazine used "commercial" in a similar sense (pp. 1154-1156). Cf. also Federal Power Commission, National Electric Rate Book (1940).

We do not argue, however, that the statute should be construed so as to make sales to all businesses taxable. The Government recognizes that the broad language used by Congress should be applied so as to give effect to the intention, evidenced by the legislative history, to exempt such sales of energy as are used by an "industrial" business for "industrial" purposes. *St. Louis Refrigerating & Cold S. Co. v. United States*, 43 F. Supp. 476, 484 (C. Cls.). If this exemption had been expressly made, it would of course have to be narrowly construed; this is *a fortiori* true here, where the exemption is not expressed and is based only on a due regard for the legislative purpose as manifested by the legislative history. We do not see how there can be found in the language

and context of the statute or in its legislative history support for the position of either the taxpayer (Br. 22, 27) or the *amicus curiae* (Br. 13, 20-21) that electrical energy sold for commercial consumption must be limited to that used in buying, selling and trading activities alone.

II

THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS INTENDED TO TAX SALES OF ENERGY TO COMMERCIAL BUSINESSES AND TO EXEMPT SALES FOR USE IN INDUSTRY

The language of Section 3411 of the Internal Revenue Code had its origin in Section 616 of the Revenue Act of 1932. Although the House Ways and Means Committee held hearings in 1932 on the feasibility of an electrical energy tax, it did not provide for it in the revenue bill it reported. (H. Rep. No. 708, 72nd Cong., 1st Sess. (1939-1 Cum. Bull. (Part 2) 457).) On May 31, 1932, the Senate approved a new provision proposed from the floor, without prior consideration by the Senate Finance Committee, by Senator Howell of Nebraska as an amendment to the then pending revenue bill. 75 Cong. Record, Part 10, pp. 11559, 11615-11616. This amendment provided:

There is hereby imposed upon energy sold by privately owned operating electrical power companies a tax equivalent to 3 per cent of the price for which so sold.

When the Revenue Bill emerged from conference of the two Houses, however, Section 616 had been changed by the conferees to provide (75 Cong. Record, Part 11, pp. 12001, 12017, 12046):

There is hereby imposed a tax equivalent to 3 per cent of the amount paid on or after the fifteenth day after the date of the enactment of this act, for electrical energy for domestic or commercial consumption furnished after such date and before July 1, 1934, to be paid by the person paying for such electrical energy and to be collected by the vendor.

Since the crucial limiting language was inserted by the conferees, weight must be attached to their explanations. The Joint Conference Committee Report stated (H. Conference Rep. No. 1492, 72nd Cong., 1st Sess., p. 22 (1939-1 Cum. Bull. (Part 2) 539, 548)):

The House recedes with an amendment substituting a tax of 3 per cent of the price paid for electrical energy for domestic or commercial use (as distinguished from industrial use), to be paid by the purchaser and collected by the vendor * * *

Representative Crisp of Georgia, a House conferee; explaining the Conference Report on the floor of the House, declared that the Senate provision had been deleted because it was unfair to investors in electric companies and that instead "the conferees finally agreed on a 3 per cent sales tax on commercial and domestic consumers

of electric energy." 75 Cong. Record, Part 11, p. 12012. And this explanation of Representative Crisp was also quoted on the Senate floor prior to its approval of the conference report. 75 Cong. Record, *supra*, p. 12066.

While the conferees, as such, made no additional express statements in their reports or on the floor of either House as to the meaning and purpose of the limitation in tax to sales of electrical energy for domestic or commercial consumption, the attention of both Houses immediately prior to approval of the conference report was called to the fact that, just before the Senate approved the original proposal of Senator Howell taxing the electric companies on sales to all consumers, two of the Senate conferees, Senators Smoot of Utah and Reed of Pennsylvania, members of the Finance Committee, had been defeated in two attempts to substitute taxes on consumers, in one case limited to sales of energy for domestic consumption and in the other to sales for domestic and commercial consumption, in language almost identical to that reported by the Conference Committee. 75 Cong. Record, Part 11, pp. 12027, 12054, 12055, 12056, 12057, 12061; Part 10, pp. 11603-11615.

At that time the reason advanced by Senators Smoot and Reed for their substitute amendments was that the tax would inevitably be passed on by the electric companies to the consumers in any event and that it would be unfair to pro-

ducers in industry who had to buy their electric power in competition with those who manufactured their own untaxed power. 75 Cong. Record *supra*, Part 10, pp. 11604, 11605, 11606, 11607, 11608, 11609. The discussions on the Smoot and Reed proposals uniformly related to whether or not manufacturers and manufacturing businesses, producers in industry and industry should be exempted, and not as to whether any particular operations in which electricity was used should or should not be covered.² 75 Cong. Record, Part 10, pp. 11603-11615. For example, Senator Howell, the author of the original proposal, stated (p. 11604):

I understand that one of the arguments advanced for relieving power consumers— I am speaking of power consumers who use electrical energy for power only— was that they would be placed at a disadvantage because of this tax as compared with the manufacturing establishments which produce their own energy. Mr. President, assume that a manufacturing concern were paying 5 mills for its electrical energy—one-half of a cent—under my amendment how much would that

²Under circumstances such as are here involved the Congressional discussions, and particular expositions by those most responsible for the legislation, have been field of considerable value in ascertaining the intent of Congress. *Wright v. Vinton Branch*, 300 U. S. 440, 463, 464; *United States v. San Francisco*, 310 U. S. 16, 22.

manufacturing establishment pay if the tax were passed on? * * *

Senator Reed stated (p. 11606):

The Committee on Finance started out with a study—a very brief one, I am afraid—of the Howell amendment. It was pointed out to us that it would make a serious difference in the competitive situation between those large producers in industry which manufacture their own power and the smaller producers who purchase power; that it would put a handicap on those who have to buy their power.

In reply to a question by Senator Borah of Idaho, Senator Reed stated again (p. 11606):

If we put the tax on industrial consumption, we impose a handicap upon the smaller producers everywhere, as against the larger producers who make their own power.

At another point, in a colloquy between Senator Reed and Senator Harrison of Mississippi, it was stated (p. 11609):

MR. HARRISON. Is "industrial" included in "commercial"? I notice in the hearings the words "industrial" and "commercial" were used.

MR. REED. No; industrial is not included.

MR. HARRISON. Should not that be included?

MR. REED. I do not think so, because in that case there would result the inequity

• between the big concern that makes its own power and the little one that does not.

In 1933, Congress revised the tax on electrical energy into the form in which it has substantially remained at present. It transferred the tax from the consumer to the electric company but continued to limit it to "electrical energy sold for domestic or commercial consumption." Act of June 16, 1933, c. 96, 48 Stat. 254, Sec. 6, Appendix, *infra*. And here, too, it appears that what was in the minds of those sponsoring the legislation was the nature of the consumer's business and not the specific operation in that business to which the electrical energy was put.

As in 1932, the electrical energy tax provision was first introduced as a floor amendment to another tax bill, but this time in the House. 77 Cong. Record, Part 2, p. 2045. As passed by the House the bill did not change the scope of the tax but merely shifted the burden from the domestic or commercial consumer to the electric company which sold the energy to him. 77 Cong. Record, Part 2, pp. 2045, 2050. The Finance Committee of the Senate, however, rewrote the House bill to decrease the three per cent tax on the vendor on sales for domestic and commercial consumption to two per cent and added a one per cent tax upon consumers of electrical energy "for purposes other than domestic or commercial." S. Rep. No. 58, 73rd Cong., 1st Sess., p. 3 (1939-1 Cum. Bull. (Part 2))

884, 885.) And the Senate so approved it. H. Conference Rep. No. 188, 73rd Cong., 1st Sess. (1939-1 Cum. Bull. (Part 2) 886); 77 Cong. Record, Part 6, pp. 5460-5461. Then, after disagreement in conference as to the form the final bill should take, the Senate concurred in the House version and they both passed it in that form. 77 Cong. Record, Part 6, pp. 5392, 5460-5461, 5462, 5468. Act of June 16, 1933, *supra*.

While the formal report of the Senate Finance Committee did not specifically define "commercial consumption," the explanation of the report by its chairman, Senator Harrison, showed that what the Committee was concerned with was the nature of the businesses in which the electrical energy was used and not the kinds of motors or lights or any specific operation or device for which the energy was used. And he also indicated to the Senate that what was meant by "commercial" business was the reciprocal of "industry," since he referred to the Senate's proposed one per cent tax upon energy "for purposes other than domestic or commercial" as an industrial energy tax. 77 Cong. Record, *supra*, Part 3, pp. 3212-3214, 3215. He stated in part (pp. 3212-3213):

I am telling Senators nothing new when I remind them that we had a fight here in 1932 over the imposition of this tax. The Senate imposed a 3 percent electric-energy tax, and it was finally

adopted, to be collected from the consumer of electric energy. We applied that only on domestic and commercial energy; that is, electric energy used in stores and dwellings that are classified as commercial and domestic. There was no tax in the 1932 act imposed upon energy employed in industry.

* * * The subcommittee reported to the full committee and we discussed it several days and finally have adopted and recommended to the Senate a provision for a tax of 2 percent on commercial and domestic energy, to be collected at the source from the power companies, reducing the House proposal in that respect from 3 percent to 2 percent. Then we have recommended an industrial electric-energy tax of 1 percent to be collected from the consumer.

Senator Couzens of Michigan, who together with Senators Barkley of Kentucky and Reed of Pennsylvania, constituted a subcommittee of the Senate Finance Committee to consider the electrical energy tax (77 Cong. Record, Part 3, p. 3220), explained (p. 3218):

I stated that when the Senate originally adopted the electrical energy tax in 1932 it did not include energy used for manufacturing, for the reason, as I thought at the time, that such a tax would create an unfair competitive condition. However, I find I was in error; that as the Senate adopted

the amendment it included all electric energy, whether used for manufacturing or for commercial or domestic purposes. The conferees, and I think properly so, eliminated the tax on electrical energy consumed in manufacturing.

* * * * *

I mean they eliminated that feature of the tax; they eliminated the tax on electrical energy sold to manufacturing plants and left the tax on electricity used commercially, that is by stores and on electricity used for domestic purposes * * *

Senator Barkley made similar explanations (77 Cong. Record, Part 3, pp. 3217, 3222) :

I presume, regardless of whether the 3-percent tax is paid on electrical energy used for commercial and domestic purposes, or whether it is divided, 2 percent on electricity used for those purposes and 1 percent on electricity used by industry, what the Senator is trying to drive at is to limit the tax to energy produced by privately owned companies?

* * * * *

Mr. President, as far as the straight 3-percent gross tax upon the distribution of industrial power affecting industry is concerned, under the amendment offered by the Senator from Nebraska, if there was any virtue in the argument made a year ago that this tax ought not to be levied on industry because it would make it more

difficult for industry to carry on during the depression, and employ the men it was able to employ, it would be even more true with a 3-percent gross tax upon electrical energy. The committee felt that a 1-percent tax upon the distribution of industrial electric power was sufficient * * *

Senator Connally of Texas, still another member of the Finance Committee, in discussing an amendment of his own to tax those manufacturers who made their own energy, also made clear to the Senate that whether a sale of energy was for commercial consumption depended upon whether or not the energy could be considered as used by industry and not upon the particular operations, in the following colloquy (77 Cong. Record, Part 3, p. 3242):

Mr. METCALF. Mr. President, there are a good many charitable institutions and educational institutions which make their own electricity. Does the Senator think it is fair to impose the tax on them?

Mr. CONNALLY. Such a use of energy would not be industrial, would it?

Mr. METCALF. Are they exempt?

Mr. CONNALLY. Does the Senator refer to industrial power?

Mr. METCALF. No; I mean light and power used in hospitals.

Mr. CONNALLY. That is not industrial power. This applies only to industrial power. That to which the Senator refers is commercial and domestic.

Since no attempt was made in the House to revise the provisions of the earlier law to broaden the scope of the tax, little further illumination may be found in its debates. But the statement of the managers on the part of the House with respect to a conference report interpreted the phrase "domestic or commercial consumption" in the same manner as did Senator Harrison. Concerning the Senate's one per cent tax on sales of electrical energy "for purposes other than domestic or commercial," it stated that the Conference Report "omits the provision of the Senate amendment imposing a tax on the consumer of industrial energy." 77 Cong. Record, Part 5, p. 4762. And in the presenting of a later conference report, Representative Samuel B. Hill of Washington, a conferee, explained that the Senate bill had reduced the tax in the House bill from three to two per cent upon electrical energy "for domestic or commercial use" and levied a one per cent tax on "energy to be used in industry" to be paid by the consumer. 77 Cong. Record, Part 6, p. 5462.

That Congress was considering types of businesses rather than particular operations performed as incidents of a single business must also be apparent from the fact that the Senate bill proposed to tax commercial consumption to the vendor at two per cent and industrial consumption to the consumer at one per cent. The Senate could hardly have intended to require the electric companies to install a separate electric meter for

each operation of a consumer's business or to involve the Treasury in the stupendous job of analyzing every business in the country to ascertain what percentage of its consumption of electrical energy related to its productions and what percentage to its commercial operations.

The legislative history of the statute thus leads to the conclusion that in taxing sales of energy for commercial consumption Congress intended to obtain revenue from sales of energy to homes and businesses; but at the same time it intended to exempt from the tax sales of energy merely to those businesses or business activities which are ordinarily considered to be manufacturing or heavy industry, including public utilities and mining, of the kind in which electrical energy is commonly understood to be used in very substantial quantity as a source of power and in which differences in the cost of energy, even as small as the three per cent tax, would be likely to have an important competitive effect upon the cost of operation of the entire business.

III

THE LONG EXISTING TREASURY REGULATIONS AND THE RULINGS OF THE BUREAU OF INTERNAL REVENUE ISSUED SUBSTANTIALLY CONTEMPORANEOUSLY WITH THE ENACTMENT OF THE STATUTE SUPPORT THE CONSTRUCTION MADE BY THE COURTS BELOW

The Treasury's contemporaneous understanding of the electrical energy tax at the time of its

original enactment gave a broad meaning to the term "commercial." Eleven days after the enactment of the Revenue Act of 1932, c. 209, 47 Stat. 169, the Secretary of the Treasury approved Treasury Regulations taking the position that "commercial" was not intended to refer to any narrow conception of selling and trading activity but to businesses generally, except for the special group which Congress had in its consideration of the law lumped together as "industry." The Treasury considered that the taxable businesses could more readily be defined by listing typical examples of the narrower and more homogeneous group which were excluded than by enumerating the more numerous and varied types which were included. Thus, Article 40 of Treasury Regulations 42, as originally promulgated, Appendix, *infra*, separated the untaxable from the taxable as follows:

"Electrical energy for domestic or commercial consumption" includes all electrical energy furnished the consumer except electrical energy furnished for industrial consumption. Electrical energy for industrial consumption includes that used generally for industrial purposes, that is, in manufacturing, processing, mining, refining, irrigation, shipbuilding, building construction, etc., and by public utilities.

³ The Revenue Act of 1932 was enacted June 6, 1932. The first edition of Treasury Regulations 42 containing a chapter on the electrical energy tax was approved June 17, 1932.

✓ waterworks, telephone, telegraph, and radio companies, railroads, and other common carriers.

An amendment to the Regulations⁴ a month later (T. D. 4342, XI-2 Cum. Bull. 495 (1932), Appendix, *infra*) was apparently made with the thought that the public utilities should be excluded as a separate group rather than as industrial businesses. And charitable institutions were also excepted on the theory that they could not fall within the concept of commercial businesses. But except as these specific exceptions appeared the Treasury Regulations continued to provide that all electrical energy furnished the consumer was taxable.⁴ Article 40 of Regulations 42 thereafter remained substantially unchanged until in 1941 by T. D. 5099, 1941-2 Cum. Bull. 267, 286, the provisions relating to the electrical energy

⁴ As amended by T. D. 4342, Article 40 of Treasury Regulations 42 (Appendix, *infra*) read in part as follows:

All electrical energy furnished the consumer is taxable except (1) electrical energy furnished for industrial consumption, e. g., that used in manufacturing, processing, mining, refining, shipbuilding, building construction, etc., and (2) that furnished for other uses which likewise can not be classed as domestic or commercial, such as used by public utilities, waterworks, irrigation companies, telegraph, telephone, and radio communication companies, railroads, other common carriers, educational institutions not operated for private profit, churches, and charitable institutions. However, electrical energy is subject to tax if consumed in the commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc.

tax were transferred to Regulations 46 where in substance the same provisions may now be found at Section 316.190 (Appendix, *infra*).⁵ During this entire period, although revisions and re-enactments of the revenue laws have been made, including several affecting the electrical energy tax,⁶ in no instance has the Treasury's broad construction of commercial consumption been disapproved, and it must therefore be regarded as having been approved by Congress. *Helvering v. Winnill*, 305 U. S. 79, 83; *Fondren v. Commissioner*, 324 U. S. 18, 29-30.

As the statute was a new one and the Regulations were necessarily in general terms, the Bureau of Internal Revenue was also compelled to make numerous rulings on individual businesses shortly after the tax became effective. The contemporaneous rulings of the Bureau in 1932 and 1933 on specific cases which were published also support the broad construction of "commercial" which we believe to be correct and are contrary to the view urged by the taxpayer (Br. 22, 27) and the *amicus curiae* (Br. 13, 20-21) that "commercial" must be confined to

⁵ At the same time "processing" was eliminated from the list of consuming business excluded from tax as industrial consumption. The Government does not believe this was a substantial change. This deletion is discussed *infra*.

⁶ Act of June 16, 1933, c. 96, 48 Stat. 254, Sec. 6; Revenue Act of 1938, c. 289, 52 Stat. 447, Sec. 713; Internal Revenue Code, Sec. 3411; Revenue Act of 1941, c. 412, 55 Stat. 687, Sec. 521 (a); Revenue Act of 1943, c. 63, 58 Stat. 21, Sec. 307 (a).

selling and trading activities. Thus, the Bureau ruled in 1932 that there was included in commercial consumption: energy used in the outdoor advertising business (S. T. 464, XI-2 Cum. Bull. 496); energy consumed by motion picture theaters (S. T. 466, XI-2 Cum. Bull. 497); energy furnished grain elevators predominantly engaged in purchasing, storage and resale of grain for producers (S. T. 527, XI-2 Cum. Bull. 499); energy used in hospitals operated for profit (S. T. 562, XI-2 Cum. Bull. 501); energy consumed by radio broadcasting stations operated for commercial or entertainment purposes (S. T. 576, XI-2 Cum. Bull. 502); energy furnished to closed industrial plants (S. T. 590, XI-2 Cum. Bull. 503, modified in part by S. T. 641, XII-1 Cum. Bull. 410 (1933)); energy furnished cold storage warehouses for use in the production of refrigeration for storage purposes (S. T. 615, XI-2 Cum. Bull. 504). The Bureau ruled in 1933, among other things, that electrical energy furnished to a warehouse operated in connection with chain stores, for use in receiving, repacking and distributing goods, operating freight elevators, refrigeration, electric trucks, blowers, conveyors, motors on bakery machinery, air conditioners, pumps and lighting was commercial in scope because it was incidental to a business whose predominant character was commercial (S. T. 652, XII-1 Cum. Bull. 411) and that energy furnished to a corporation engaged in the operation and maintenance of a cemetery for use in

lighting a garage was taxable because the cemetery was a commercial venture (S. T. 674, XII-1 Cum. Bull. 412); that energy furnished in the operations of farming, including that used for ensilage cutters, cream separators, oat crushers, threshing machines, water pumps and miscellaneous machinery was taxable as either domestic or commercial in scope (S. T. 637, XII-1 Cum. Bull. 409; S. T. 695, XII-2 Cum. Bull. 324).

In 1933 the Bureau ruled specifically with reference to dairies (S. T. 637, XII-1 Cum. Bull. 409, 410) (Appendix, *infra*):

A dairy which obtains milk and converts it into use for retail purposes is held to be engaged in a business commercial in character. Electrical energy used in such operations will be subject to tax.

Electrical energy furnished to dairies which are engaged in the manufacture and sale of butter, cheese, and similar dairy products is not subject to the tax imposed by section 616 of the Revenue Act of 1932.

In 1932 the Bureau issued a ruling that "Electrical energy furnished for consumption by bottling works, milk companies, or creameries engaged in the pasteurization and bottling of milk, and in the manufacture of butter, buttermilk, chocolate milk, and cottage cheese, is not furnished for domestic or commercial consumption". S. T. 518, XI-2 Cum. Bull. 498 (1932) (Appendix, *infra*). Apparently realizing, however, that this broad ruling, applicable to dairies and creameries engaged in a variety of activities, might not be adequate to meet the needs of Collectors who had to decide on the taxability of sales of energy to consumers solely

Both the contemporaneous Regulations and the rulings cited thus show that the Treasury Department understood "commercial consumption" in the same sense as may be inferred from the legislative history of the law. "Commercial consumption" is not merely that energy used in buying and selling; it includes as well the energy used in all the normal and customary incidents of businesses not predominantly in industry in the sense to which we have previously adverted.

This contemporaneous construction by the executive department charged with the administration of the law and the general acquiescence in such construction by the large utility corporations directly affected by its application* ought to be

or predominantly fluid milk dealers or distributors and not cheese or butter manufacturers, shortly after the first ruling, the bureau modified it by issuing S. T. 637, above. See Bureau's contemporaneous explanation (Appendix, *infra*, pp. 67-68.)

Although S. T. 637 has been followed to date by the Bureau of Internal Revenue (R. 115), it is significant that for nine years, until action was filed against the United States in the District Court for Colorado by the Public Service Company of Colorado in 1942 (*Public Service Co. of Colorado v. United States* (Colo.), decided July 6, 1943 (32 A. F. T. R. 1720), affirmed, 143 F. 2d 79 (C. A. 10th)), none of the many electric utility companies of the United States affected by the ruling brought suit to contest it, and the taxpayer here did not file a claim for refund until May 1944. (R. 2, 8.)

* Until *Public Service Co. of Colorado v. United States*, *supra*, was decided in July 1943, only two other cases had been brought to contest the Bureau's construction or application of the electrical energy tax with respect to "commercial consumption." These were *St. Louis Refrigerating & Cold S. Co. v. United States*, 43 F. Supp. 476 (C. Cls.) and *Fulton*

given great weight in determining its meaning, even independently of the reenactment rule. *White v. Winchester Club*, 315 U. S. 32, 41; *Better Business Bureau v. United States*, 326 U. S. 279, 286; *Brewster v. Gage*, 280 U. S. 327, 336.

Both the taxpayer (Br. 37-40) and the *amicus curiae* (Br. 14, 15-16, 19) urge, however, that a portion of the Regulations lends support to the notion that though a business is predominantly commercial, an operation or activity, even if it is merely a normal integral incident of the commercial business, may be industrial (or "in industry") if the operation or activity, viewed in isolation from the rest of the business, is not carried on as a "commercial" activity. And this view was apparently likewise shared by the Court of Appeals for the Tenth Circuit when it stated in *United States v. Public Service Co. of Colorado*, 143 F. 2d 79, 82, that the electrical energy used in pasteurizing "was not used in the commercial phase of the dairying enterprise, but in *Market Cold Storage Co. v. United States*, 43 F. Supp. 485 (C. Cls.), both decided March 2, 1942.

During the hearings held on the 1933 amendment which made the electric companies pay the tax, a representative of 75 percent of the companies testified that they had given a broader construction to the term "commercial" than even the Treasury had, and that the Treasury had excluded many large commercial consumers and had classed them as industrial. (Hearings before the Senate Finance Committee on H. R. 5040, Amendment to Revenue Act of 1932, 73rd Cong., 1st Sess., May 2 and 3, 1933, pp. 3, 30.)

the processing or industrial phase of the enterprise."

The portions of the Regulations relied on by both the taxpayer and the *amicus* are the following (Treasury Regulations 46, Sec. 316.190, Appendix, *infra*):

However, electrical energy is subject to tax if sold for consumption in the commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc., * * *.

Where electrical energy is sold to a consumer for two or more purposes, through separate meters, the specific use for which the energy is sold through each meter, i. e., whether for domestic or commercial consumption, or for other use, shall determine its taxable status. Where the consumer has all the electrical energy consumed at a given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of this tax.

These portions of the Regulations first appeared in Article 40 of Treasury Regulations 42, as amended in July 1932 by T. D. 4342.

We submit, however, that these additions to the Regulations were not intended to change the meaning of "commercial consumption" so as to permit classification of particular uses, opera-

tions and activities as "industrial" without regard to their relationship to the nature of the business as a whole. Electrical energy is ordinarily used for light, power or heat. As such it may light a room or building or it may operate a motor that lifts an elevator or compresses a refrigerant or turns a fan or pump. But if the use is commercial it is not because of what the energy does but because the operation or activity in which it is used is an incident to a commercial business. If the criterion of a sale of energy for commercial consumption were whether the specific use of the energy is commercial apart from the nature of the business in which it is an incident, the law would be reduced to an absurdity since no use of energy would fall within the taxable status.

The portion of the Regulations relied on by the taxpayer and *amicus curiae* has a far more reasonable purpose than is suggested by their arguments. When Congress considered the broad concepts of commerce and industry for purposes of the tax, it apparently did not take into account the fact that some enterprises engage in more than one kind of business, and the law made no express provision for this contingency. The Treasury was also faced with the classification for purposes of the tax of sales organizations and branches of large industrial corporations having separate buildings and stores, which could hardly

come within the reason for the statutory exemption of industrial consumption. Since the statute provided no express answer to these problems, the Treasury adopted what it considered was the most practical and reasonable construction of the law. It amended its Regulations to provide that where there were separate meters measuring the different types of consumption, the tax would attach only to the energy sold for commercial consumption. Where there was a single meter, the predominant nature of the business at the location would control. If the non-industrial portion of an industrial business constituted a separate phase of the business, and if it had a separate office building, sales and display rooms, retail stores, etc., so that the energy used in these separate suborganizations could be separately measured, the tax would attach there too. It is difficult to see how another construction of the statute could have been made which would have been more consistent with the legislative purpose or more reasonable and fair in its application. And we submit that the asserted inconsistency between the Regulations and the decision of the courts below is more fancied than real.

The language of this Court in *Bowles v. Seminole Rock Co.*, 325 U. S. 410, 413-414, is especially pertinent here:

Since this involves an interpretation of an administrative regulation a court must

necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

IV

THE DAIRIES TO WHICH THE TAXPAYER SOLD THE ELECTRICITY ARE MILK DEALERS OR DISTRIBUTORS AND THE ELECTRICAL ENERGY FURNISHED THEM WAS FOR COMMERCIAL CONSUMPTION

There is no controversy in this case with respect to sales of energy to creameries or dairies engaged predominantly in the business of making and selling butter, cheese, ice cream and similar products. In cases where it has been shown that such is the predominant business of a customer, the Government does not attempt to assess or collect a tax on sales of energy to it. (S. T. 637, Appendix, *infra*; R. 113-115.) But with the exception of sales to the Pabst Farms, upon which taxpayer apparently inadvertently paid the tax, the energy at issue here was sold to customers whose business the trial court found to be predominantly that of fluid milk dealers and distributors. (R. 31, 142-143, 147.)

The milk dealers⁹ involved take orders from customers living in definite territories or routes in the City of Milwaukee and adjoining communities for the daily and sometimes even more frequent delivery of fresh milk.¹⁰ Most of the orders are received from homes, but in some instances they are also obtained from restaurants, hotels and stores. The dealers in turn obtain the milk in bulk from country producers scattered at various places in Wisconsin, outside of Milwaukee, with whom they make contracts for the delivery of fresh milk at daily or other regular intervals to their establishments in Milwaukee and the adjoining communities.¹¹ In some instances the producers bring the milk to Milwaukee; in others the dealers use their own trucks and drivers. (R. 8, 9, 143.)

That the maintenance and operation of an effective daily distribution service between producer and consumer for a food product readily subject to spoilage is a commercial business, the District Court held to be clear. (R. 137.) The only question which remains is: Does the fact that

⁹ Pabst Farms will be excluded from this category in the discussion, *infra*, as it may not properly be described as a milk dealer.

¹⁰ At the time of trial, however, wartime restrictions caused the introduction of alternate day deliveries. (R. 143.)

¹¹ The bulk of the milk is brought in from over an area extending thirty to thirty-five miles outside of Milwaukee though some as far as fifty miles. (R. 87.)

the dealers pasteurize the milk make their businesses predominantly industrial?

The District Court held that the fact that the twenty-seven dairies employ pasteurization to purify their milk does not cause the predominant character of their businesses to be other than that of fluid milk dealers and distributors; that the electricity sold to them by the taxpayer was sold and used in commercial businesses; and that it was sold for commercial consumption. We submit that in so holding the District Court applied the most reasonable tests which could be used consistently with the statute and Regulations, and that its conclusions are the only ones which it could properly have reached from the evidence.

Pasteurization, as practiced in modern dairies, consists of an efficient method of heating milk short of boiling to destroy a maximum quantity of bacteria, if they happen to be present, without inducing the changes in flavor ordinarily caused by boiling. (R. 9, 66, 77-78, 144-145.) The milk is then cooled sufficiently soon thereafter to avoid the possible further breeding or multiplication of bacteria. (R. 64, 75, 144.)¹² The main purpose

¹² In Babcock, The Pasteurization of Milk, U. S. Department of Agriculture Leaflet No. 177 (1939) 2, the pasteurization of milk is defined as follows:

"The pasteurization of milk for direct consumption, as applied under commercial conditions, means a process of heating every particle of milk to a temperature not lower than 142° F. for not less than 30 minutes (holder process) or to a temperature not lower than 160° F. and holding at that temperature or above for not less than 15 seconds. (Short time,

of this treatment is as a precaution against the possibility that harmful germs may have accumulated in the milk, principally from contact with disease or dirty handling in the course of distribution, but also from diseases in cows which may have escaped discovery; and another purpose is to retard spoilage in the hands of the dealer, by the destruction of bacteria which may be present. (R. 71, 77-78, 79-80.)

The District Court found from the undisputed evidence that the distribution of milk has existed in the United States as a distinct form of business for nearly a century.¹³ Pasteurization of milk on a substantial scale was not established in this country until 1897. It came into use in Milwaukee in 1903 and became common practice there only as recently as 1915. (Finding 9, R. 143-144; R. 81-82.)¹⁴ In cities having over a thou-

high temperature process.) After the milk is pasteurized, it is immediately cooled to 50° F. or lower."

¹³ In Kelly and Clement, *Market Milk* (2d ed., 1931) 2, it is stated that shipments of milk in bulk by rail to dealers in Boston were being made in 1838 and in New York in 1847. In Roadhouse and Henderson, *The Market-Milk Industry* (1941) 4, it is pointed out that dealers maintained retail milk routes in large cities before 1840.

¹⁴ In Kelly and Clement, *supra*, 327, the statement appears that it was not until 1904 that any appreciable amount of the general milk supply was pasteurized. Roadhouse and Henderson, *supra*, 5, report that prior to 1900 nearly all the milk sold in the United States was not pasteurized and by 1909 only 25 per cent of New York City's milk was pasteurized. And cf. also Sommer, *Market Milk and Related Products* (2d ed., 1946) 106.

sand population in the United States a majority of the milk dairies still distribute unpasteurized milk and more than twenty-five per cent of all milk sold in cities of this size is not pasteurized.¹⁵ (Finding 9, R. 143-144; R. 75-76, 119-122, 129-130, 133.) In nearly one-third of the municipalities none of the milk dealers pasteurize the milk they distribute. (R. 132.) On the other hand, as the District Court also found, two expert witnesses in the field of dairy operation and economics, who were present at trial, testified that they had never heard of a dairy plant which pasteurized and bottled its milk which was not a distributor. (Finding 9, R. 144; R. 82, 87.)

The trial court stated that while pasteurization is an important part of the business of the twenty-seven dairies, they likewise utilize systems of rapid regular distribution of fresh milk to their customers, and maintain fleets of trucks, horse-drawn wagons, and drivers, garages, loading and unloading facilities, weighing and testing devices, storage and refrigeration rooms, and machinery for putting milk into bottles at high speed. (Finding 15, R. 146; R. 8-10.)

The court found from the evidence that the cost of pasteurization accounts for only an insignificant part of the costs of operation of the

¹⁵ The weighted mean for all cities of at least a thousand population shows that there are 0.8 milk distributors per thousand population who do not pasteurize against only 0.17 who do. (R. 120-121.)

dairies. Of the quart of milk which, at the time of trial the Milwaukee milk dealers sold and delivered for sixteen cents, the milk itself cost 9.6 cents, the distribution in bottles about four cents¹⁶ and the entire plant operations about one cent.¹⁷ Only one-tenth of a cent of the cost of plant operations was attributable to pasteurization.¹⁸ (Finding 15, R. 146; R. 11, 87-89, 93.)

¹⁶ Included in the four cents was also the cost of delivering whatever other products the milk man delivered.

¹⁷ Published studies of plant costs in other areas show comparable results. Kelly and Clement, *supra*, 416, report that a study of the Borden Milk Company in New York showed 10 percent of the consumer's milk dollar went for the operation of the city milk plant. Roadhouse and Henderson, *supra*, summarize a study of twelve milk plants in a large California city, made in 1938, which show total plant processing and handling costs of .99 cent to 1.64 cents per quart of milk selling at 12 cents. The Massachusetts Milk Control Board, Summary Report on Cost of Distributing Milk in the Boston Market (1936) 14, 21, ascertained that all operations from the time the milk arrived in the city until it was stored in bottles, including an allocable portion of the administrative expenses, totalled .85 cent per quart, while retail delivery of the bottled milk cost 4.25 cents. The Report of the New York State Commissioner of Agriculture and Markets Regarding the Audit of Milk Dealers, Legislative Document No. 100 (1938) 7, reports city processing costs for milk and dairy products of .471 cent per quart of milk handled. See also Sommer, *supra*, 606; Tinley, Public Regulation of Milk Marketing in California (1938) 125-126; Federal Trade Commission, Report on the Distribution and Sale of Milk and Milk Products, Boston, Baltimore, Cincinnati and St. Louis, House Doc. No. 501, 74th Cong. 2d Sess., 146.

¹⁸ Only a few published studies of the cost of pasteurization alone have been found. Such a breakdown apparently has

The court also found that pasteurization utilizes only a small fraction of the total personnel of the dairies.¹⁹ (Finding 15, R. 146; R. 95.)

little practical value. Those studies which have been published, although in different areas and for different periods do not vary substantially from the evidence in the record. Kelly and Clement, *supra*, 337, state that the average cost of pasteurizing a gallon of milk in 1922 was .49 cent (or .12 cent per quart), including depreciation, repairs, interest, labor, coal, water and refrigeration. In Bowen, *The Cost of Pasteurizing Milk and Cream*, U. S. Department of Agriculture Bulletin No. 85 (1914) a detailed analysis of five city milk plants shows an average pasteurizing cost of .3 cent per gallon (.078 cent per quart) including allocations of tangible and intangible plant costs. In Dow, *An Economic Study of Milk Distribution in Maine*, The Maine Agricultural Experiment Station Bulletin No. 395 (1939) there were compared the plant costs of seventeen raw milk distributors with twenty-eight larger distributors of pasteurized milk and it was found that there was only a .3 cent difference in plant costs for handling the milk, and part of this difference could have been due to the use as well of other than pasteurizing equipment by the twenty-eight. See also King, *The Price of Milk* (1920) 189, 209, and Mortensen, *Management of Dairy Plants* (1938) 109.

¹⁹ The number of employees engaged in entire plant operations at the milk dealers' plants is generally considerably smaller than those engaged in actual distribution and sales. See Exhibits D through N of the stipulation (omitting only J. Pabst Farms). (R. 15-44.)

Kelly and Clement, *supra*, 358, state that in a study of 112 plants made by them in 1929 they found that in small plants ordinarily only one man was required to operate and clean the pasteurizing equipment, while in large plants 1,800 quarts of milk were pasteurized per man-hour of labor attributable to pasteurization.

And, moreover, it found the evidence to show that pasteurizing causes only a minor part of the capital investments. The investment of the dairies in pasteurizing equipment, including increased cooling equipment is from 15 to 20 per cent of the total cost of their plant equipment, but this percentage figure would be considerably smaller if the investment in such items used in pick up and distribution as trucks and other vehicles, horses, bottles, cases, etc., were taken into consideration. (Finding 15, R. 146; R. 64, 73-74.)²⁰

Still further to emphasize that the milk dealers are predominantly in a distributing business is the evidence that seven of the ten whose business is described in detail in the stipulation of the parties²¹ engage in the practice of buying, selling

²⁰ The taxpayer argues (Br. 47, and see 7, '8, 41) that pasteurization "is the central activity around which turn the other activities of the pursuit." But we are unable to find support in the record for this statement.

²¹ Luick Dairy Co. sells orange drink which it prepares by mixing water with a concentrate it buys from a manufacturer. (R. 17.) Layton Park Dairy engages in the same practice. (R. 26.) Leo Galles purchases ice cream mix from manufacturers and freezes, flavors and sells it. (R. 29.) Rolland J. Ruby buys orange drink concentrate, butter, eggs, cottage cheese and buttermilk for resale purposes. (R. 35.) The Borden Co. buys orange drink concentrate, butter and eggs for resale purposes. (R. 37.) The South Side Dairy purchases orange and grape drink concentrates, butter, cottage cheese and buttermilk for resale purposes. (R. 41.) The Westfield Dairy purchases orange drink and butter for resale. (R. 43.)

and making regular deliveries along their routes of other fresh perishable foods in addition to milk, such as eggs, butter, fruit juices and fruit drinks. (R. 17, 26, 29, 35, 37, 41, 43.) And this is common practice among milk dealers and distributors. (R. 89-90.)

That washing the reusable bottles and cans and then filling them by high speed automatic methods to expedite delivery and avoid spoilage does not change the character of the business needs little elaboration.²² Commercial vendors generally package the goods they sell for suitable handling and delivery. Milk bottles are not sold but are to be returned to the dealer; they are not permanently sealed but only temporarily capped; they do not change the form of the product nor improve its quality; the cleaning is no more than would be required of any vendor twice using a container; and the automatic operation is to expedite the dealer's delivery and does not differ essentially from filling any other container by hand.

And as an additional indication that this was not the kind of business which Congress intended to exempt from taxation as being engaged in industry is the fact that milk dealers do not come within the reason for the exemption. As has already been noted, *supra*, the stated reason for not taxing energy sold to industrial consumers was that the probable passing on of the tax by the

²² Cf. *Williams v. Harrison*, 110 F. 2d 989 (C. A. 7th).

electric company would^o unfairly discriminate against those industrial consumers who purchased electrical energy and who had to compete with manufacturers in the same business who produced their own energy. But despite years of study in the dairy field neither of the expert witnesses who testified in court had ever heard of a fluid milk dealer or distributor who did generate his own electrical energy, since, unlike the common industrial and manufacturing enterprises electrical energy is but an insignificant item in the costs of milk dealing. (R. 83, 89, 94-95.)

We submit that from the foregoing the District Court properly concluded that the milk dairies are predominantly commercial businesses, that the sales of energy to them were for commercial consumption and that the pasteurizing of the milk could not change the character of the business but was merely an ordinary incident of that kind of business. ^oCf. *Richmond v. Dairy Co.*, 156 Va. 63; *Suabedissen-Wittner Dairy v. Dept. of Treas.*, 105 Ind. App. 626.²³

In support of its argument that the energy sold to the milk dairies, was not for commercial consumption, the taxpayer relies heavily upon the reasoning of the Court of Appeals for the

²³ Pasteurization has been held likewise to be merely an incident of agricultural activity where practiced at farm dairies, in cases construing the social security tax laws. *Larson v. Lees Dairy Co.*, 154 F. 2d 701 (C. A. 5th); *United States v. Navar*, 158 F. 2d 91 (C. A. 5th).

Tenth Circuit in *United States v. Public Service Co. of Colorado*, 143 F. 2d 79. (Br. 20-24, 34.) There the court held that because the Treasury Regulations, until 1941, included "processing" in industrial consumption²⁴ the pasteurizing of milk was industrial consumption. It reasoned further that as all manufacturers and processors are engaged in part in commercial activities, it can not be said that pasteurization is merely an incident to a commercial business, since it can likewise be said that the selling of the manufactured article is always but an incident of any manufacturing business; and to follow what the court thought was the Government's position would be to tax sales to all businesses. Also, apart from the Regulations, it held that the sales of electrical energy were nontaxable because the energy was not used in the commercial phase of the dairying enterprises but in their processing or industrial phase. Pursuing this line of reasoning, the taxpayer urges that the evidence in the instant case necessitates the conclusion that pasteurization is industrial processing of milk, analogous to manufacturing which converts a raw product into a finished one, such as manufacturing steel from iron ore or gasoline from crude oil. (Br. 48-49.)

We submit that the reasoning of the Court of Appeals for the Tenth Circuit in the *Colo-*

²⁴ It does not appear in Section 316.190 of Treasury Regulations 46. (Appendix, *infra*.)

rado case is in error and should not be followed. We believe, first, that that court construed the statutory term "commercial" in the narrow sense of buying and selling activity, which, as we have argued herein, is erroneous. It was thus able to conclude that because pasteurizing milk is not buying and selling it was an industrial phase of the business. Second, even after construing the phrase "commercial consumption" in a narrow sense, it erred further in failing to note that even in buying and selling businesses the only taxable consumption of electrical energy must be in some incident of the business which is not in itself buying or selling.

Third, the Court of Appeals for the Tenth Circuit misconstrued the concept "industrial consumption." As we have argued, the common meaning of the phrase, which is the sense in which it was used by Congress in considering the statute, is that kind of consumption which is ordinarily engaged in by industry rather than by or as a common incident to a predominantly commercial business. Pasteurization of milk, the mere heating and recooling of milk immediately prior to bottling it, although by efficient mechanical means in large dairies, is shown by the findings of the District Court in the instant case to be merely an incident of the business of those engaged in the distribution of milk, and, as far as could be ascertained by the trial court, it is not engaged in apart from such distribution.

(R. 144.) . Pasteurization is, therefore, merely an incidental activity to a commercial business and not an activity in industry.

Fourth, we believe the Court of Appeals for the Tenth Circuit erred in claiming that it relied upon the Regulations when in fact it used only that portion of the Regulations which included the word "processing" as a type of industrial consumption while it disregarded that part of the Regulations which provided that where there is no separate metering the predominant character of the business shall control. For even if the use of electrical energy for pasteurization, isolated from the other aspects of the milk dealing business, could be considered as a use in industry, we submit that the facts with respect to the fluid milk business, found by the trial court in the instant case in answer to every reasonable test of predominant character we can think of, show adequately and persuasively that the milk dealers are engaged predominantly in the commercial business of daily distribution of fresh clean milk and the pasteurization of the milk merely subserves that end.

Fifth, we submit that the reliance by both the taxpayer and the Court of Appeals for the Tenth Circuit upon the word "processing" in the Treasury Regulations prior to 1941 is misplaced because it disregarded the context in which the word appeared.

Article 40 of Regulations 42, as amended by T. D. 4393 (Appendix, *infra*), contained the phrase:

The term "electrical energy sold for domestic or commercial consumption" does not include (1) electrical energy sold for industrial consumption, e. g., for use in manufacturing, processing, mining, refining, shipbuilding, building construction, irrigation, etc. * * *

On November 28, 1941, by T. D. 5099, 1941-2 Cum. Bull. 267 (Appendix, *infra*), the term "processing" was stricken out.

That the particular activity in which electrical energy is used may be characterized under the broad description "processing" can not be decisive, since many kinds of commercial businesses engage in processing, packaging or preparing of the product in which they deal and yet it can not reasonably be considered that because of it the nature of their business or their entire consumption of electrical energy becomes industrial. For example, a restaurant "processes" raw foods and converts them into finished products fit to be eaten. Yet one could not reasonably consider as industrial the energy used in cooking the food (whether electric, gas or other), and certainly not the entire energy used by the business—since a fair picture of the consumer's operations necessarily results in the conclusion that it is a commercial business. The same might also be said of

a tailor using electric sewing machines or a distributor of fruit or eggs who might use electrically operated devices for cleaning or polishing his products. If all those who engaged in "processing" in its broadest sense were in industry, there would be included the soda fountain, the drug store, the photographer, the optician, the jeweler who sets diamonds and repairs watches, the grocer who grinds up the coffee before selling it, and even the Government department which processes forms, letters, and memoranda.

It is obvious that the Regulations were intended by the Treasury to be construed under the *ejusdem generis* rule and the processing referred to was that engaged in by industries similar to mining, refining, shipbuilding, building construction, irrigation, etc., or else there would have been no need to enumerate them. But even more convincing proof that the Treasury intended by the phrase "electrical energy sold for industrial consumption, e. g., for use in * * * processing * * *" to include only sales to businesses predominantly engaged in processing of an industrial nature and that the processing meant did not include pasteurization of milk is the fact that shortly after it promulgated this original language the Treasury issued a ruling (S. T. 637, XII-1 Cum. Bull. 409, 410 (1933), Appendix, *infra*), in which it specifically held that a dairy which obtains milk and converts it into use for retail

purposes is engaged in a business commercial in character and the electrical energy used in such operations is subject to tax. And, in the interpretation of an administrative regulation "a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt." *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 413-414.

The argument that Congressional re-enactment of the revenue laws from 1934 through 1940 codified the term "processing" into the law and that the Treasury could not delete the term of course argues too much, even if the term were given the meaning attributed to it by the taxpayer and the Court of Appeals for the Tenth Circuit in the *Colorado* case. If Congressional acquiescence constituted approval of the form of the Regulations prior to 1941, then under the same rule similar acquiescence from 1941 through 1948, including amendment of the specific section in 1943, must have had the same effect with respect to the deletion of the word "processing" in 1941. In *Helvering v. Reynolds*, 313 U. S. 428, this Court stated (p. 432):

That rule is no more than an aid in statutory construction. While it is useful at times in resolving statutory ambiguities, it does not mean that the prior construction has become so embedded in the law that only Congress can effect a change.²³

²³ See also *American Chicle Co. v. United States*, 316 U. S. 450, 454-455.

On the other hand, if taxpayer's argument were valid that the use of the word "processing" in the 1932-1941 Regulations covers pasteurization of milk and that the Court is required to hold the Regulations determinative, then the collection of the taxes would still be proper for the period subsequent to 1941, since this Court has held that the Treasury may properly change Regulations prospectively even if Congress re-enacted the statute while a different interpretation had been put on it by the Treasury. *Helvering v. Reynolds*, *supra*; *Helvering v. Wilshire Oil Co.*, 308 U. S. 90; *Morrissey v. Commissioner*, 296 U. S. 344, 355.

What is a far more reasonable inference from the change in the Regulations is that the Treasury realized, in the light of actual problems encountered in the administration of the electrical energy tax, that "processing" was too vague and ambiguous to be of assistance in interpreting the statute, and deleted it accordingly. It was believed that the test of what was the predominant character of the business and the listed types of business which were excluded from the tax, was as definite as general regulations could reasonably be expected to go in dealing with the broad concepts laid down by the statute and the rest must be left to case analysis.

The taxpayer (Br. 43-44) and the *amicus curiae* (Br. 20-21) also argue that the decision of the

courts below is in conflict with that portion of the Regulations which provides that the predominant character of the business carried on at a given location shall determine the classification of consumption, since, taxpayer asserts, the commercial activities of the milk dealers are carried on outside the plant. The argument assumes that "commercial" must be interpreted in the narrow sense of buying and selling only. The argument is also facilitated by their substituting the word "activities" for "business" in the phrase "predominant character of the business carried on at such location" in Regulations 46. But even under this narrow construction of the law certainly it can not reasonably be maintained that a distributing or delivery business is not carried on at its main office where the merchandise is brought, unloaded, sorted, packaged, stored, kept under refrigeration, made ready for delivery, and loaded, where the delivery equipment is maintained, drivers pick up their goods and receive their pay and instructions, where records are maintained, money is turned in, orders are received and where all the other functions necessary to the operation of any business are carried on. Moreover, as we have submitted, pasteurization and bottling being merely an incident to the milk dealing business, it can not be considered as consumption by industry even if it were carried on at locations separate from the ultimate buying.

selling, distributing and other characteristic activities of a commercial business.

The taxpayer's attempt to depict the pasteurizing of milk as a manufacturing process which converts raw milk into a finished product is, we submit, likewise unreal. We do not dispute the beneficial results of pasteurization. But the record also shows that pasteurization does not change the taste, flavor, form or appearance of milk; it merely cleans or purifies it, in the only practical manner in which such cleansing can be done without changing it, against the possibility that the product may have become contaminated at its source or in handling. However, milk obtained from a healthy cow is a wholesome and beneficial food fit for human consumption with or without pasteurization. (R. 78.) Like many fruits and vegetables that must be cleaned against possible remaining insect sprays, dirt and mold-producing spores and bacteria, or like eggs which must be candled and cleaned before being sold, milk is still milk after as well as before it is pasteurized. Nothing is added by pasteurization and it will not necessarily be healthier or cleaner or contain fewer harmful bacteria because of it. (R. 9, 77-78.) Pasteurization may actually not be as effective in eliminating possible harmful bacteria as may boiling by the ordinary domestic housewife. (R. 77, 86.) Where milk is obtained from healthy cows through sanitary methods and

proper precautions are taken against contamination in the course of distribution, as in the case of certified milk, pasteurization is not essential.²⁶ (R. 77-78.)

We submit, therefore, that to describe pasteurized milk as in the nature of a manufactured product is a distortion and that both from the evidence and from common knowledge a more accurate characterization is that of a product which may be cleaner or purer, like other foods distributed in their natural form after they have been washed or cleaned. Cf. *Fruit Growers, Inc. v. Brodrex Co.*, 283 U. S. 1; *Anheuser-Busch Assn. v. United States*, 207 U. S. 556. And this view is supported by the weight of authority in the state courts. *City of Louisville v. Ewing Von-Allmen D. Co.*, 268 Ky. 652; *People ex rel E. S. Dairy Co. v. Sohmer*, 218 N. Y. 199; *Richmond v. Dairy Co.*, 156 Va. 63; *Sugbedissen-Wittner Dairy v. Dept. of Treas.*, 105 Ind. App. 626; *People v. Stevens Co.*, 178 App. Div. (N. Y.) 306, appeal dismissed, 221 N. Y. 622; *Dairy Assn. v. Bd. of Tax Admin.*, 302 Mich. 643, 649. But

²⁶ Until recently the designation "certified milk" (milk produced and bottled by dairies operating under strict standards of cleanliness and purity), was not permitted to be used for milk that was pasteurized. (R. 78.) See also Kelly and Clement, *supra*, 456 and Sommer, *supra*, 102.

cf. *H. P. Hood & Sons v. Commonwealth*, 235 Mass. 572, 576.²⁷

²⁷ In *City of Louisville v. Ewing Van-Almen D. Co.*, *supra*, p. 655, the court stated:

* * * is appellee engaged in the manufacturing of milk? We think not, because the process used means nothing more than the removing of all impurities from raw milk; because all raw milk may contain various kinds of impurities coming from an unclean condition of the cow's udder or from the person doing the milking or otherwise of the cow. The old-fashioned way was using the strainer; in fact, such instruments are used now by the ordinary housewife. Still, from a healthy cow, milked by a careful person and properly strained, the milk would need no further cleansing. It is not only palatable, but nourishing and healthful. However, in later years, especially in cities and closely populated communities, it has been thought wise and proper to purify milk by machinery. We call it "pasteurizing the milk," which means nothing more or less than to remove from the raw material all germs, bacteria, and other foreign substances that might be in it. However, when the process is complete, we have nothing left but milk, the same article and raw material that comes fresh from a healthy cow by the hands of a careful and clean milker, after it has been properly strained and prepared for use by a first-class, clean and tidy housewife. The milk, after the pasteurization is complete, contains the same ingredients as it had in it when it came from the cow. It is only made clean food to be used. It has lost none of its palatable taste as when it came from a healthy cow. Still, it contains all of the ingredients that it formerly had.

In *People ex rel. E. S. Dairy Co. v. Schmeck*, *supra*, pp. 202-204, it was stated:

* * * the question whether said assessment was correct or not will be determined by the answer to be

CONCLUSION

We submit that the courts below properly held that the sales of electrical energy to milk dealers and distributors, who pasteurize their milk as an incident to their business were taxable as sales of

given to the further question whether the pasteurization of milk in which relator employed a large part of its capital is a manufacturing process. If such business was one of manufacture the relator was entitled to exemption from taxation of so much of its capital as was employed in pasteurizing milk and selling the same * * *. If in pasteurizing and selling milk it was not engaged in manufacturing, then * * * the assessment was correct. * * *

In the light of * * * the description of the processes through which the milk is passed and of the results obtained thereby, it is perfectly apparent that the object and result of pasteurization are to free milk from germs and foreign substances of various kinds without destroying or changing the inherent and essential qualities of the milk itself. There is no purpose by the application of any foreign substance to change its superficial appearance or by any method to alter its substantial form and character as would be the case if it were made into butter or cheese. It is entered upon the process as milk, and it is taken therefrom as milk. The only change accomplished has been to relieve it from objectionable matter which is not properly an inherent part thereof, and thereby to make it more fit for those purposes to which milk is naturally devoted.

* * * we are still unable to discover as the result of pasteurization any such degree of change in the form, nature or intended use of milk when compared with its original condition * * * that the process producing such change could be regarded as one of manufacture.

energy for commercial consumption, and the decision of the Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully,

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Solicitor General.

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,

LEE A. JACKSON,

PHILIP R. MILLER,

Special Assistants to the Attorney General.

DECEMBER 1948.

APPENDIX

Internal Revenue Code:

SEC. 3411. TAX ON ELECTRICAL ENERGY FOR DOMESTIC OR COMMERCIAL CONSUMPTION.

(a) There shall be imposed upon electrical energy sold for domestic or commercial consumption and not for resale a tax equivalent to 3 per centum of the price for which so sold, to be paid by the vendor under such rules and regulations as the Commissioner, with the approval of the Secretary, shall prescribe. The sale of electrical energy to an owner or lessee of a building, who purchases such electrical energy for resale to the tenants therein, shall for the purposes of this section be considered as a sale for consumption and not for resale, but the resale to the tenant shall not be considered a sale for consumption.

(b) The provisions of sections 3441, 3444, and 3447 shall not be applicable with respect to the tax imposed by this section.

(c) No tax shall be imposed under this section upon electrical energy sold to the United States or to any State or Territory, or political subdivision thereof, or the District of Columbia. None of the provisions of this section shall apply to publicly owned electric and power plants, or to electric and power plants or systems owned and operated by cooperative or nonprofit corporations engaged in rural electrification. The right to exemption under this subsection shall be evidenced in such manner as the Commissioner, with the approval of

the Secretary, may, by regulation, prescribe.

* * * * *

(26 U. S. C. 1946 ed., Sec. 3411.)

Section 3411 (a) was amended by the Revenue Act of 1941, c. 412, 55 Stat. 687, Sec. 521 (a) (19), to change the three percent tax to three and one-third percent.

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 616. TAX ON ELECTRICAL ENERGY.

(a) There is hereby imposed a tax equivalent to 3 per centum of the amount paid on or after the fifteenth day after the date of the enactment of this Act, for electrical energy for domestic or commercial consumption furnished after such date and before July 1, 1934, to be paid by the person paying for such electrical energy and to be collected by the vendor.

(b) Each vendor receiving any payments specified in subsection (a) shall collect the amount of the tax imposed by such subsection from the person making such payments, and shall on or before the last day of each month make a return, under oath, for the preceding month, and pay the taxes so collected, to the collector of the district in which his principal place of business is located, or if he has no principal place of business in the United States, to the collector at Baltimore, Maryland. Such returns shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulation prescribe. The Commissioner may extend the time for making returns and paying the taxes collected, under such rules and regulations as he shall prescribe.

with the approval of the Secretary, but no such extension shall be for more than 90 days. The provisions of sections 771 to 774, inclusive, shall, in lieu of the provisions of sections 619 to 629, inclusive, be applicable in respect of the tax imposed by this section.

(c) No tax shall be imposed under this section upon any payment received for electrical energy furnished to the United States or to any State or Territory, or political subdivision thereof, or the District of Columbia. The right to exemption under this subsection shall be evidenced in such manner as the Commissioner with the approval of the Secretary may by regulation prescribe.

Act of June 16, 1933, c. 96, 48 Stat. 254:

SEC. 6. (a) Effective September 1, 1933, section 616 of the Revenue Act of 1932 is amended to read as follows:

“SEC. 616. TAX ON ELECTRICAL ENERGY FOR DOMESTIC OR COMMERCIAL CONSUMPTION

“(a) There is hereby imposed upon electrical energy sold for domestic or commercial consumption and not for resale a tax equivalent to 3 per centum of the price for which so sold, to be paid by the vendor under such rules and regulations as the Commissioner, with the approval of the Secretary, shall prescribe. The sale of electrical energy to an owner or lessee of a building, who purchases such electrical energy for resale to the tenants therein, shall for the purposes of this section be considered as a sale for consumption and not for resale, but the resale to the tenant shall not be considered a sale for consumption.

“(b) The provisions of sections 619, 622, and 625 shall not be applicable with respect to the tax imposed by this section.

“(c) No tax shall be imposed under this section upon electrical energy sold to the United States or to any State or Territory, or political subdivision thereof, or the District of Columbia. None of the provisions of this section shall apply to publicly owned electric and power plants. The right to exemption under this subsection shall be evidenced in such manner as the Commissioner, with the approval of the Secretary, may, by regulation, prescribe.”

(b) Despite the provisions of this section the tax imposed under section 616 of the Revenue Act of 1932 before its amendment by this section on electrical energy furnished before September 1, 1933, shall be imposed, collected, and paid in the same manner and shall be subject to the same provisions of law (including penalties) as if this section had not been enacted.

Treasury Regulations 42, promulgated under the Revenue Act of 1932:

ART. 40. *Scope of tax.*—The tax applies to the amount paid for all electrical energy furnished for domestic or commercial consumption, either by a privately or publicly owned operating electrical power company.

“Electrical energy for domestic or commercial consumption” includes all electrical energy furnished the consumer except electrical energy furnished for industrial consumption. Electrical energy for industrial consumption includes that used generally for industrial purposes, that is, in manufacturing, processing, mining, refining, irrigation, shipbuilding, building con-

struction, etc., and by public utilities, waterworks, telephone, telegraph, and radio companies, railroads, and other common carriers.

The tax attaches to all amounts paid for electrical energy for domestic or commercial consumption irrespective of whether any of the energy paid for is actually used. In other words, the tax is due on all payments for electrical energy whether in the form of a minimum charge, a flat charge, or otherwise.

* * * * *

T. D. 4342, XI-2 Cum. Bull. 495 (1932):

Article 40 of Regulations 42 is amended to read as follows:

"The tax applies to the amount paid for all electrical energy furnished for domestic or commercial consumption by any person or agency (whether private, public or quasi public) irrespective of whether such person or agency produces the energy so furnished. (For definition of the word 'person,' see section 1111 of the Act.)

"All electrical energy furnished the consumer is taxable except (1) electrical energy furnished for industrial consumption, e. g., that used in manufacturing, processing, mining, refining, shipbuilding, building construction, etc., and (2) that furnished for other uses which likewise can not be classed as domestic or commercial, such as used by public utilities, waterworks, irrigation companies, telegraph, telephone, and radio communication companies, railroads, other common carriers, educational institutions not operated for private profit, churches, and charitable

institutions. However, electrical energy is subject to tax if consumed in the commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc.

"Where electrical energy is supplied to a single consumer for two or more purposes, the specific use for which the energy is furnished, i. e., whether for domestic or commercial consumption, or for other consumption, shall determine its taxable status. Where the consumer has all the electrical energy used at a given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of electrical consumption for the purposes of this tax."

* * * * *

T. D. 4393, XII-2 Cum. Bull. 322 (1933):

* * * * *

Section 616 of the Revenue Act of 1932 was amended by section 6 (a) of the Act of Congress approved June 16, 1933 (Public, No. 73, Seventy-third Congress). In conformity with the law as so amended, Chapter V of Regulations 42, approved October 22, 1932, is amended, effective with respect to electrical energy sold on or after September 1, 1933, to read as follows:

* * * * *

"ART. 39. *Effective period.*—The tax applies to electrical energy sold on or after September 1, 1933, and before July 1, 1935.

"ART. 40. *Scope of tax.*—The tax is imposed upon electrical energy sold for domestic or commercial consumption and not for resale, except as provided hereinafter.

"The term 'electrical energy sold for domestic or commercial consumption' does not include (1) electrical energy sold for industrial consumption, e. g., for use in manufacturing, processing, mining, refining, shipbuilding, building construction, irrigation, etc., or (2) that sold for other uses which likewise can not be classed as domestic or commercial, such as the electrical energy used by public utilities, waterworks, telegraph, telephone, and radio communication companies, railroads, other common carriers, educational institutions not operated for profit, churches, and charitable institutions. However, electrical energy is subject to tax if sold for use in the commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc.

"Where electrical energy is sold to a single consumer for two or more purposes, through separate meters, the specific use for which the energy is sold through each meter, i. e., whether for domestic or commercial consumption, or for other use, shall determine its taxable status. Where the consumer has all the electrical energy used at a given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of this tax." ²⁸

* * * * *

²⁸ These Regulations, consistently with extensions of the law, were altered as concerns the provision thereof concerning effective date by T. D. 4570, XIV-2 Cum. Bull. 391 (1935); again by T. D. 4751, 1937-2 Cum. Bull. 517; and again by T. D. 4922, 1939-2 Cum. Bull. 363.

Treasury Regulations 46 (1940 ed.):

SEC. 316.190 [as amended by T. D. 5099, 1941-2 Cum. Bull. 267]. *Scope of tax.*—

The tax imposed by section 3411 (a) of the Internal Revenue Code, as amended, applies, except as provided hereinafter, to all electrical energy sold for domestic or commercial consumption and not for resale.

The term "electrical energy sold for domestic or commercial consumption" does not include (1) electrical energy sold for industrial consumption, e. g., for use in manufacturing, mining, refining, shipbuilding, building construction, irrigation, etc., or (2) that sold for other uses which likewise can not be classed as domestic or commercial, such as the electrical energy used by electric and gas companies, waterworks, telegraph, telephone, and radio communication companies, railroads, other similar common carriers, educational institutions not operated for private profit, churches, and charitable institutions in their operations as such. However, electrical energy is subject to tax if sold for consumption in commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc., or in domestic phases, such as in dormitories or living quarters maintained by educational institutions, churches, charitable institutions, or others.

Where electrical energy is sold to a consumer for two or more purposes, through separate meters, the specific use for which the energy is sold through each meter, i. e., whether for domestic or commercial consumption, or for other use, shall determine its taxable status. Where the consumer has all the electrical energy consumed at a

given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of this tax.

* * * * *

S. T. 518, XI-2 Cum. Bull. 498 (1932):

Advice is requested whether electrical energy furnished bottling works, milk companies, and creameries is taxable under section 616 of the Revenue Act of 1932.

Electrical energy furnished for consumption by bottling works, milk companies, or creameries engaged in the pasteurization and bottling of milk, and in the manufacture of butter, buttermilk, chocolate milk, and cottage cheese, is not furnished for domestic or commercial consumption and is not subject to the tax imposed by section 616 of the Revenue Act of 1932. However, the use of electrical energy in branch offices or agencies of such industries is a commercial use and electrical energy so used is subject to the tax.

S. T. 637, XII-1 Cum. Bull. 409 (1933):

Advice is requested concerning the tax on electrical energy imposed by section 616 of the Revenue Act of 1932 when furnished to a farmer who runs a dairy and sells milk to a commercial dairy which distributes the milk on a retail basis.

It is held that electrical energy furnished in the general operations of farming, such as lighting the homes or dwellings, barns, and other farm buildings; ensilage cutters; cream separators; oat crushers; threshing machines; water pumps; etc., and for the operation of other miscellaneous machin-

ery such as is used in general farming operations, is domestic or commercial in its scope and, therefore, is subject to the tax imposed by section 616 of the Revenue Act of 1932.

A dairy which obtains milk and converts it into use for retail purposes is held to be engaged in a business commercial in character. Electrical energy used in such operations will be subject to tax.

Electrical energy furnished to dairies which are engaged in the manufacture and sale of butter, cheese, and similar dairy products is not subject to the tax imposed by section 616 of the Revenue Act of 1932.

1948 C. C. H., Vol. 4, par. 2633G:

.175 *Rulings reconciled*.—S. T. 637 (.045 and .065) does not amount to a reversal of S. T. 518 (.033), but is a modification and extension of the opinion rendered therein, insofar as it affects dairy farms and milk dealers. General operations of farming are domestic and commercial in character and electrical energy furnished for use in these operations is subject to the tax. The mere fact that certain incidental dairy processes are carried on at a farm will not affect the taxability of the electrical energy consumed at such a location since the predominant character of the operations of farming is held to be domestic and commercial.

Electrical energy furnished a commercial dairy or milk company which merely produces or purchases raw milk in bulk and pasteurizes it for sale either in bulk or bottled quantities, whose activities consist principally in the handling, distribution and sale of milk, is also subject to the tax.

It is only electrical energy that is furnished for direct consumption by dairies which in addition to pasteurizing and bottling milk are also engaged in all the essential manufacturing processes necessary for the production of dairy products, such as the manufacturing of butter, cheese and other dairy products, for sale on the open market as an article of commerce, that is not subject to the tax.

Bureau Letter, dated May 13, 1933 (symbols MT:ST:BHF), (333CCH16266.)

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SUPREME COURT U S

IN THE
Supreme Court of the United States

OCTOBER TERM—1948

No. 237

WISCONSIN ELECTRIC POWER COMPANY

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

BRIEF FOR THE CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC., AS AMICUS CURIAE

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as Amicus Curiae

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Of Counsel

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**BRIEF FOR THE CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC., AS AMICUS CURIAE**

Review has been asked here as to the construction and effect given by the Court below to the provisions of the Internal Revenue Code which since 1932¹ have imposed upon "electrical energy sold for domestic or commercial consumption"

a tax equivalent to the stated percentage of the price for which the energy is so sold. No tax has been imposed on energy sold for "industrial consumption" or on energy sold "for other uses which likewise cannot be classed as domestic

¹ Originally enacted as Section 616 of the Revenue Act of 1932 and continued to date through re-enactment, amendment as to payment by the vendor of the energy and increase in the percentage, and inclusion in the Internal Revenue Code as Section 3411 thereof. The statute and the Treasury Regulations involved are in the Appendix (pages 25 to 27, *post*).

or commercial" (Regulations 42 (1932 edition) as amended by T. D. 4342 and T. D. 4393 and Regulations 46 as amended by T. D. 5099).

Preliminary Statement

The issue here is as to the rule which the Court below² laid down for determining whether the electrical energy sold to a particular consumer at a particular location or locations is taxable as sold for "commercial consumption". The case had arisen as to energy supplied for consumption in the pasteurizing of milk in plants operated by dairies in Wisconsin, but the Court of Appeals placed its decision on the broad ground, not limited or limitable to pasteurization plants, that as a matter of law

" * * * the proper test to be applied in determining whether the electrical energy used by a particular consumer falls within the term 'commercial consumption' is *whether the predominant character of the business enterprise carried on by the consumer is commercial, irrespective of the particular operations in which the energy is used.* (R. 167)" (italics supplied)

The energy supplied to the dairies and used in the pasteurization of milk was thus held to be sold for "commercial" consumption *because* the dairies were engaged in a business predominantly commercial in character; but such a ruling, if upheld, would extend and apply equally to very many thousands of other situations where energy is sold to enterprises whose activities are principally but not exclusively commercial. The issue therefore arises as to whether or not such a ruling is consistent with the statute, with the Treasury Regulations which have been

² The opinion of the Court of Appeals (R. 166-68) is reported at 168 F. 2d 285. The opinion of the District Court (R. 140-46) is at 69 F. Supp. 743. The judgment of the Court of Appeals is at R. 168. Certiorari was granted October 18, 1948.

left in force unchanged during five re-enactments or extensions of the law, and with the fair and practicable administration of the statute, which would suffer greatly if there were overturned now the classifications of consumption according to Regulations contemporaneous with the enactment of the statute in 1932.

The Solicitor-General's Memorandum on the Petition for Certiorari urged (page 7) that the Court of Appeals had "correctly held" that the energy supplied to a predominantly commercial business is sold for "commercial" consumption, regardless of the nature and purpose of the actual use of the energy, and stated concisely (pages 6-7) in terms of questions of law the two aspects here for review:

1. "The District Court concluded as a *matter of law* that the incidence of the tax on electrical energy does not depend upon the particular operation in which the energy is used but upon the business of which it forms a part. * * * The Court of Appeals held that * * * the District Court * * * applied the proper test of commercial consumption."

2. "*Since the predominant business of the twenty-seven dairies is, and was, that of fluid milk dealers and distributors, the electricity sold to them by the petitioner was sold for commercial consumption; it was sold and used in a commercial business. (R. 152-153.)*" (italics supplied)

We do not think it will be challenged that from its genesis, the statute has based the liability for the tax upon the *consumption*, not the consumer. The taxing law and the Treasury Regulation have not at any time said that the tax should be paid upon all of the energy supplied to a "commercial" consumer (i. e., one whose business is *predominantly* commercial) or that no tax should be paid upon any of the energy consumed in a business that is *predominantly* industrial. On the contrary, large quantities of energy sold to consumers engaged *predominantly* in industrial activities have been classified, and have been taxed for

years, as commercially consumed; and much energy sold to predominantly commercial consumers has been classed as non-taxable industrial consumption.

A business *predominantly* industrial, taking into account its many locations and phases, may and does have commercial activities and use electrical energy in them. A business *predominantly* commercial may and does have locations and activities of an industrial character and is sold energy for industrial consumption at such locations. For both classes of consumers, the nature and purpose of the consumption through the particular meter or at the location, not the predominant character of the customer's whole business at all locations, have determined since 1932 what consumption is taxable. Energy supplied to a location for commercial and non-commercial purposes but separately metered, is taxable only as to that commercially consumed. *Only if and where the consumer has only one meter at a location and receives through it energy for two or more purposes (one of them commercial) has "the predominant character of the business carried on at such location" (not at all locations of the consumer's business) determined "the classification of consumption for the purposes of this tax" (T. R. 42 of 1932; Art. 40 as amended by T. D. 4393).*

This provision has been in Regulations 42 through every revision of it since 1932 and was adopted with only a minor change in Section 316.190 of Regulations 46, in effect since 1941. Since 1932 the law imposing the electrical energy tax has several times been reenacted, extended, or changed in other respects; but in no instance has this construction by the Treasury been disapproved; the brief for the Government in the Court below said (page 19) that "It must therefore be regarded as having been approved by Congress". The Regulation for separate treatment of the energy consumed at a single location where different uses are supplied through a single meter, and indeed the whole plan and scope of the Regulations, seem plainly to negative a test based

only on the nature of the consumer's predominant business at all locations.

We recognize that the Government has, as it admitted below in the present case, tried at times to sort out and tax as commercial some of the energy supplied to particular locations in businesses predominantly industrial,³ and also to reclassify as "commercial" some instances of the use of energy in industry; but the very making of such an effort over years reflects a very different view of the Regulations from that given effect by the present ruling that all consumption of energy by a commercial consumer must as a matter of law be treated and taxed as "commercial".

The ruling of the Court of Appeals for the Seventh Circuit that, regardless of separate metering and differences in the purposes for which energy is consumed at different and possibly far distant locations or through separate meters at the same location, the test of taxability is the predominant character of the enterprise is directly contrary to that of the Court of Appeals for the Tenth

³The brief for the Government in the Court below (page 19) stated what has been taking place as to sorting out and taxing as "commercial" some of the consumptions of energy which take place at some locations of predominantly industrial enterprises. The Government's brief said:

"It is true the Treasury has at the same time attempted to carry out a difficult mandate of Congress to its full limits *by reaching out to find sales for commercial consumption in sales to distinct recognizable branches or phases of businesses carrying on commercial activities despite the fact that the overall predominant character of the entire legal entities might be characterized as industrial*, where such branches or phases have been geographically separated or separate adjuncts are not typical integral parts of such businesses and where the electricity sold to such branches or phases has been separately metered." (italics supplied)

Circuit, which held in *United States v. Public Service Company of Colorado*, 143 F. 2d 79, 82, that the consumption to which the energy is put at the particular location is controlling, rather than the predominant nature of the consumer's business at all locations, and specifically that the pasteurizing of milk by Colorado dairies and the consumption of energy in such pasteurizing were not in "the commercial phase of the dairying enterprise" but in an industrial processing and non-commercial activity of the dairies. The Government did not ask for certiorari to review this factual ruling in the Tenth Circuit, but presented the pasteurization question anew to the Seventh Circuit, on the basis of some Wisconsin dairies which it evidently regarded as preponderantly commercial.

Because the Consolidated Edison Company of New York, Inc., and its affiliated or System Companies in New York City and Westchester County pay about one-tenth of the electrical energy taxes and supply energy to many pasteurization plants of dairies in their territory and also to other non-commercial activities of many commercial consumers, this group of Companies desires to place before the Court the considerations stated in this memorandum. These Companies submit that, under the statute and the Regulations, all of the energy supplied by them to consumers whose business is predominantly commercial could not merely for that reason be classified as "commercial" as a matter of law.

Questions of fact as to the purpose and circumstances of use at particular locations are made controlling by the statute and the Regulations, which were based on the diversities and disparities obtaining in industries and businesses in different parts of the country. The Wisconsin dairies and pasteurization plants are not necessarily typical of those of all parts of the country. In Colorado the Court of Appeals held that the dairies' pasteurization plants are not a commercial phase of the

enterprise. In New York and Westchester County, different and factually distinguishable pasteurization plants and electric consumption in them, as compared with those of Wisconsin, would be shown in the tax suits brought by these Companies and pending in the District Courts.

These Companies refer to these factual diversities, but recognize that they are immaterial if all energy supplied to any dairy is "commercial" as a matter of law, and if any energy supplied to any activity of a predominantly commercial enterprise is "commercial" as a matter of law. So we discuss at this stage the questions of law which are well tendered by the Solicitor-General,¹ and shall also call

¹The Solicitor-General's formal statement, on page 2 of his Memorandum on the Petition for Certiorari, of the three questions which he regards as presented here, gives the issues fairly and clearly, except that his third question appears to us to be an important phase of the first question; and we therefore combine them. His first question is to the effect that the nature of the operation in which the energy is consumed should be disregarded as a matter of law, to give controlling effect to the predominant nature of the consumer's whole business. His second question treats all sales of energy to dairies for the pasteurization of milk as for "commercial" consumption as a matter of law because the business of the dairies is preponderantly "commercial." We may best denote the joinder of issues here by quoting the Solicitor-General's formulation of the three questions which he regards as implicit and basic in the decision of the Seventh Circuit:

"1. Does 'commercial consumption' refer to the particular process in which the energy is used or does it refer to the nature of the business of the consumer to which the energy is sold, irrespective of the particular process in which it is used?

"2. The District Court found and the Court of Appeals upheld the finding that sales of electrical energy to dairies which are principally fluid milk dealers were sales to commercial businesses and not to industrial businesses and hence held the energy

(Footnote continued on next page)

attention to the vast, complicated and costly reclassification of customers, consumption and billing which would be required as to many types of uses of energy if the decision below were upheld. Whether the proceeds of the tax for the Government would be increased or decreased by giving effect to the Court's radical alteration of the legislative basis for applying the tax could not here be forecast.

We indicate a few of the countless typical and actual instances of drastic reclassification which the present decision would entail after sixteen years of administration and collection of the tax under Regulations which have been deemed reasonably explicit and informative:

A large steel-producing corporation, with mills and plants in numerous States, has its general office building in New York City. Energy supplied to that building has long been classified and taxed as "commercial". As the predominant business of the corporation is industrial, should energy supplied to its office building be now ruled non-taxable?

A nationally-known chain-store, with outlets in many cities, has factories in various cities, where articles are

(Footnote continued)

was sold for commercial consumption. Should the sales of energy nevertheless be considered as being for other than commercial consumption if it can be found that a substantial part of the energy was used in pasteurization or bottling and similar preparations for the sale and delivery of the milk?

"3. Is the decision of the Court of Appeals that the character of the consumption of the energy depends upon the nature of the consuming business contrary to Section 316.190 of Treasury Regulations 46, which provides that where energy consumed at a given location is furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of the tax?"

made or processed for sale in its stores. The concern is predominantly commercial, but its factories are and have been treated as obviously "industrial," and taxed accordingly. Should the energy supplied to these factories be hereafter taxed as "commercial"?

Energy supplied to telephone, telegraph and railroad companies is non-taxable as for "industrial" consumption; energy supplied to branch offices of those concerns is taxed as "commercial". Should the energy supplied to those offices be now held non-taxable because supplied to predominantly industrial enterprises?

A nationally-known jewelry store on Fifth Avenue in New York City has its factory in New Jersey. Energy supplied to the factory is for industrial use; must it be reclassified and taxed as supplied to a predominantly commercial enterprise?

An electric appliance manufacturing concern, with many factories, has general offices and sales offices in New York City. Energy supplied to the offices is now taxed as "commercial". Should it now be relieved of taxes because the corporation is predominantly industrial?

Pursuant to Rule 27 of the General Rules of this Court, the parties hereto by their counsel have consented to the filing of this brief.

Argument

Section 3411(a) of the Internal Revenue Code taxes electric companies upon energy sold for "domestic or commercial" consumption but not upon energy sold for "industrial consumption" or other non-commercial consumption. The basic questions here are stated thus:

A. Does "commercial consumption" of the energy supplied take place as a matter of law wher-

ever the consumer is engaged in a business which is predominantly commercial; or should the nature of the operation in which the energy is used at the location supplied and the separate metering of the energy consumed as between commercial and non-commercial purposes determine the tax classification, consistently with the statute and Treasury Regulations?

B. Does not the decision of the Court of Appeals that the character of the consumption of energy depends as a matter of law upon only the predominant character of the consumer's business at all locations contravene Section 316.190 of Treasury Regulations 46, which gives effect to separate metering of energy for different uses, recognizes the non-taxability of energy consumed for industrial purposes, and provides that where the energy for different uses is supplied through only one meter, the predominant character of the business *at that location only* (not at all locations) shall determine the taxability of the energy sold through the one meter?

C. Does the fact that various dairy companies in Wisconsin were found to be predominantly "commercial" businesses mean and require that electrical energy sold to those dairies for consumption in milk pasteurization plants and processes shall be deemed *as a matter of law* to be sold for "commercial" consumption because sold for consumption in a plant of a dairy customer whose overall business is predominantly commercial? Irrespective of factual circumstances as to the plants, the operation, the metering and use of the energy, and the business predominantly carried on at the plants, is all of the energy sold for use in the pasteurization of milk by dairies, anywhere in the United States, to be taxed as commercially consumed *as a matter of law* because it is

supplied to concerns whose business is predominantly (not exclusively) commercial?

Summary of Argument

It is the position of this group of taxpayers that

1. The Congress and the Treasury Regulations did not make or permit a determination that all of the energy consumed at a location (or at all locations) of a consumer is taxable as "commercial" to depend and be based solely, as a matter of law, on the fact that the consumer's business as a whole is predominantly commercial. Electrical energy is often supplied for other than "commercial" consumption at particular locations in businesses which are predominantly "commercial", even as energy is often supplied for "commercial" taxable consumption at locations in businesses which are predominantly industrial. The statute and the Regulations require that the nature of the operation in which the energy is consumed and (where different uses are not separately metered) the predominant character of the business *at the location* (not at *all* locations or the consumer's business as a whole) be given effect in determining what consumption is taxable as "commercial". The decision below as to the proper test and method for determining what use of energy is taxable is inconsistent with the statute and contrary to Section 316.190 of Treasury Regulations 46 (quoted on pages 26-27, *infra*), and would impose a vast, complicated and costly reclassification of consumers and consumption, of dubious gain to the Government or taxpayers.

2. The finding below that the sales of energy to dairies for use in their pasteurization plants were sales to dairies which are commercial enterprises, and that "*hence*" the energy should as a matter of

law be treated as sold for "commercial" consumption, regardless of the facts as to its meterization and use and as to the predominant character of the dairies' business at the particular location, is repugnant to the statute and the Regulations. The particular facts as to the metering, the other uses of energy at the location through one or separate meters, and the predominant character of the business *at the location* (if "commercial" and non-commercial uses are not separately metered), are explicitly required to be given effect and could not be cast aside in favor of a test which is in no way indicated, and is at many points expressly negated, in the Regulations.

I

The Congress and the Treasury regulations did not make and do not permit a determination that all of the energy supplied to a consumer at a location is taxable as sold for "commercial" consumption as a matter of law for the reason that it is supplied to a consumer whose business as a whole is predominantly "commercial" in character.

Section 616 (a) of the Revenue Act of 1932 and the Treasury Regulations which have been in effect ever since did not and do not provide or intend that electrical energy supplied at a location to a consumer whose *total* business at all locations is predominantly commercial shall on that account be taxed as "commercial". The taxability of the consumption of energy was not made to depend on the predominant character of the overall business of which it is a part. The statute and the Regulations seem to us so plainly to repudiate as the test the predominant character of the business as a whole that examination of the legislative record as to the intent of the Congress is unnecessary.

Yet, if made an inquiry as to the origins of the statute and the Regulations leaves no doubt as to the intent. A great deal took place before the tax on electrical energy was imposed in its present form in 1932; and that history, well known to the Commissioner and the Treasury at the time and taken into account in the wording of the statute and the Regulations, seems to us to confirm that the decision below is unsupportable. The taxing of electrical energy was avowedly a part of a program for obtaining more tax revenues. The first assumption and proposal were that it was practicable to tax all sales of energy for consumption, and to have the electric companies assess, bill and collect the tax from their consumers. It was found that, in fairness and practicability, the tax could not be imposed on large uses of energy where a privately-owned plant (untaxable) might compete with a regulated (and taxed) public utility. So it was sought to obtain revenue by having the company assess and collect the energy tax from "domestic or commercial" uses of energy, in dwellings, retail stores and shops, small sales concerns, etc.⁵ Actually, the intent which

⁵ Terms such as "domestic or commercial" and "industrial" (and "industrial or other") were put in the statute as guide for later defining the intended boundaries between taxability and non-taxability of particular consumption. These were not regarded as definitive in the electrical industry or as used in the dictionary sense of words. Definition by Regulations was required. "Industrial" was obviously much broader than "manufacturing" or "wholesale". The Regulations contemporaneous with the 1932 statute specifically included as also "industrial" the consumption of energy for many purposes obviously "commercial" in any ordinary sense, such as railroads, telegraph, telephone and radio, and other public utilities, along with mining, refining, irrigation, educational institutions not operated for profit, churches and charitable institutions (Article 40, Regulations 42 as amended; Section 316.190, Regulations 46 as amended). The exemption from taxation was referred to as of energy supplied for consumption for "industrial or

finally found expression in the law and the Regulations was that only *small* commercial consumption could be taxed, along with the domestic. The Regulations quickly freed from the tax many types of large commercial use, as well as "industrial or other businesses". A multiplicity of references to 1932-33 proceedings in the Congress could be cited to demonstrate this legislative intent. On this basis, Section 616(a) of the Revenue Act of 1932 was enacted, in a wording which is still in effect aside from a change in the percentage of the tax (See Appendix, page 25, *post*).

The Treasury Regulations, as initially issued and as still in effect, were palpably and explicitly based on the nature and purpose of the *consumption* at the meter and location billed, not the general nature of the consumer's business at all locations. The electric companies were to compute the tax on such energy as was sold for commercial consumption at a meter or location, put it on their bills for each unit, and collect and pay over the proceeds. The companies knew, from their inspections, etc., the nature of the consumption of energy at a meter and location in their territory; but their billing of the tax obviously could not be based on the predominant character of the consumer's business, perhaps carried on in many States.

As probably was foreseen, the projected tax to be paid *by consumers*, upon the specified types of their *consumption* of energy, was transmuted in 1933 into a tax to be paid by the *vendors* of the energy; but the form and basis of the

(Footnote continued)

other businesses". But to this was added the further proviso, which seems to be decisively against the decision below and the Government's apparent contention here; viz., the proviso for the taxability nevertheless of such energy as is sold "*for consumption in commercial phases of industrial or other businesses*", with apposite instances of "commercial" consumption on "industrial" premises given in Article 40, Regulations 42 as amended.

tax, and the Regulations, were retained.⁶ Ever since the enactment of the tax in its present form in 1932, the Regulations, interpretations, and generally the rulings, have conformed to the statute by treating as taxable only such energy as was sold for "domestic or commercial consumption", with the particular location or the separate meter as the unit for determining the nature or purpose of the use of the energy supplied to it—not the nature of the overall business of the consumer, at all his locations.

Ever since the original enactment of the tax, the Regulations have been contrary to determining the nature of the consumption of energy by the overall character of the consumer's business. Its applicability to "energy sold to a consumer for two or more purposes, through separate meters" (as is usually the case) has been determined, from the first, by "the specific use for which the energy is sold through each meter; i.e., whether for domestic or commercial consumption, or for other use" (T. R. 42 of 1932; Art. 40 as amended by T. D. 4393; T. R. 46 of 1940, Section 316.190 as added by T. D. 5099). Regardless of the overall nature of the consumer's business at its various locations or the predominant character of the business done at the particular location, the test of the taxability of the energy sold through a meter (or through several meters combined for billing purposes) was "the specific use" for which that energy was sold. The decision below, to the effect that the overall nature of the consumer's business at all locations determines the nature of the consumption at each and every location, is rejected by the Treasury Regulations since 1932

⁶ Mr. Whittington, the author of the 1933 amendment which was enacted, testified before the Senate Finance Committee that the amendment "does one thing and one thing alone: It transfers this tax from the consumer to the vendor". The statements on the floor of the Senate and House, at the time of the adoption of the Conference report, were to like effect (77 Cong. Record 5463-65, -66, and -67).

that if the use of energy at a location is for two or more purposes (one of them taxable), and if

“the consumer has all the electrical energy consumed at a given location furnished through one meter, the *predominant character* of the business carried on at *such location* shall determine the classification of consumption for the purposes of this tax” (T. R. 42 of 1932; Art. 40 as amended by T. D. 4393). (*italics supplied*).

The Regulations in force since 1932 have left no doubt of these *criteria*, which the decision at bar rejects and contravenes. If “industrial or other businesses” have “commercial” phases, “such as in office buildings, sales and display rooms, retail stores”, etc., the energy sold for consumption in such “commercial activities” is taxable (T. R. 46; Section 316.190), even though the consumer’s whole business is predominantly “industrial” or non-commercial. If a commercial enterprise such as a department store owns and operates a manufacturing plant at another location, the energy supplied to the plant is exempt as for industrial consumption. The Bureau has consistently held that if a bakery enterprise has its retail store in the front of its property and its bakery in the rear, the energy supplied may be separately metered and the energy consumed in the bakery is non-taxable.

T. D. 4342 and 4393 have not been changed in substance from 1932 to date; the Congress has on five occasions re-enacted, extended or amended in other respects the taxing statute; and the Court of Appeals for the Tenth Circuit has held, *without an application by the Government for certiorari*, that the consumption to which the energy is put at the particular location is controlling, rather than the overall nature of the customer’s business at all locations, even where the overall business is commercial (*United States v. Public Service Company of Colorado*, 143 F. 2d 79, 82).

On the other hand, in *St. Louis Refrigerating and Cold Storage Co. v. United States*, 43 F. Supp. 476, the taxpayer's consumption of energy was in the manufacture and sale of ice, the sale and distribution of refrigeration through pipe lines to numerous customers, and the providing of refrigeration for its warehouses in various parts of the city. The various phases of the business were thus commingled. Of the taxpayer's activities, the Court said in its findings (page 480):

"Electrical energy used in the manufacture of ice for sale is not subject to the tax if separately metered."

The Court said (page 483):

" . . . No separate meter was maintained for the part that was industrial and there is no satisfactory showing as to the amount of electrical energy consumed in that phase of the business."

In the *St. Louis Refrigerating* case, the taxpayer's business being thus predominantly commercial at each location, with no separate metering of the energy used for non-commercial purposes, the taxpayer's total consumption of energy was held to be taxable. This ruling stops far short of holding that the overall commercial character of a customer's business should be imputed to consumptions of energy through separate meters for "industrial" uses or at locations where the "commercial" activities are slight if any.

Uncertainty and Confusion Would Result from the Enforced Reclassifications of Consumptions

We think it would be idle to suggest or seek that the broad grounds of decision by the Court below, for the classification of each consumption of electrical energy according to the predominant character of the consumer's overall business at all his locations rather than the nature and purpose of the consumption at the particular location or through the particular meter, were or could be limited

to cases involving the pasteurization of milk. The Solicitor-General in his Memorandum for the Government on the Petition for Certiorari here put his contention on no such limited ground (page 7). If the Seventh Circuit's test based on ascertaining the predominant nature of the consumer's business—in disregard of the nature of the activities served by the meter and the energy supplied through it—were now sustained, a complete reclassification of "commercial" and "industrial" electrical consumers throughout the United States would be inescapable.

The decision in the Seventh Circuit would overturn the administrative rulings and practice which have obtained since 1932 and would compel, in the territory of virtually every electric company, ^{extensive} vast and costly reclassifications of customers and changes in the ^{determination} billing of the tax. Whether the outcome would be gain or loss to the Government we could not forecast. There are many instances where the energy supplied is not now deemed taxable because it is for non-commercial uses at the particular location although the customer's predominant business in the United States as a whole is commercial. On the other hand, there are many instances where the energy supplied is now deemed taxable (e.g., that to a New York City office or sales building of a national manufacturing concern) but would not be taxable if the criterion declared by the Seventh Circuit were sustained; e.g., the predominant character of the customer's business at all locations.

The proposed new test of commercial character would be hard to classify and apply. The nature and purpose of the use of electricity through a meter at a location are reasonably ascertainable, through inspections, etc. For an electric company in one city to find out whether the business of, say, a national concern or one having establishments in several States is predominantly "commercial" or "industrial", would not be easy. All sorts of questions as to operations, finances, output, profits, etc., might have to be

explored. This the billing electric company could not readily do.

In a sense, the activities of practically every industry and business have a "commercial" aspect, in that they are to eventuate in sales; but as to the applicability of this tax, the Congress and the Commissioner carved out large areas of activities—many of them consisting of the very essence of commerce⁷—and classified them as "industrial" or other businesses so that they would not be taxable. Even then, the test has been the nature and purpose of the consumption of the energy supplied through the particular meter or at the particular location—not the overall general character of the customer's business.⁸

We think that a statute taxing certain *uses and consumption* of electrical energy is contravened by making the overall character of the customer's business necessarily controlling as to the kind of consumption at all of his locations. Legislative intent need hardly be inquired into, but the evidences are clear that the tax was thought of as being imposed on energy consumed in dwellings, stores and shops, and not on industrial concerns or uses. "Commercial phases of industrial or other businesses", to be separated and taxed, were specified in the Regulations as including such uses as in "office buildings, sales and display rooms, retail stores, etc."

⁷ Such as railroads, telegraphs, telephones, converting, refining, transporting, etc. (Section 316.190 of Regulations 46 as amended by T. D. 5099). The exemption was described as of energy consumed in "industrial or other businesses".

⁸ Thus the energy supplied to a telegraph or telephone system is "industrial", but the energy supplied to one of their branch offices is "commercial". The energy supplied to general or business offices of large manufacturing concerns is "commercial". The energy supplied to a bakery is exempt as "industrial"; that supplied to its store or retail outlet, in front of the same property, is separately metered and taxed as "commercial".

The long-established practice in the electric business and the contemporaneous construction in 1932 and 1933 by those charged with the federal taxing of electrical consumption and responsible for the plan embodied in the Treasury Regulations, generally to treat each meter or location of a customer as a customer and to inspect and ascertain the nature of the use of energy at that location and apply the tax accordingly, should not be upset except for weighty reasons.

Commissioner of Internal Revenue v. South Texas Lumber Company, 333 U. S. 496, 500-501 (1948).

II

Consumption of electrical energy in dairy plants engaged in the pasteurization of milk does not become consumption for "commercial" purposes for the reason that the business of the dairies is predominantly "commercial".

We believe that we have shown that the Court below applied the wrong test and arrived at its conclusion on untenable grounds, as to the pasteurization plants. The Court was of the opinion that *since* the business of the dairy concerns as a whole is predominantly "commercial" from the purchase of the raw milk to the distribution and sale of the pasteurized or homogenized milk or milk products, *therefore* the energy supplied to the dairies at any location and for any purpose is necessarily for "commercial" consumption, for purposes of the taxing statute. If this construction were right, none of the energy supplied at any location or for any use, to a predominantly industrial concern (e.g., to its general office, its sales office, or its sales warehouses), would be taxable; and all of the energy sold to any location of a predominantly commercial concern would be taxable, even though the separate location is

devoted exclusively to manufacturing or other "industrial" uses. We have shown that this has never been in the Regulations or the practice, as to this tax on energy.

There has been no intimation in the Congress of an intention to impose the tax on energy sold for operations such as pasteurization plants. The Congress, by five separate provisions over a period of nine years, has either re-enacted, extended or amended the statute without changing the language which the Regulations construed. Congress did not depart from what Senator Pat Harrison had said in 1933 that the tax was imposed only on "energy used in stores and dwellings that are classified as commercial and domestic" (77 *Cong. Record* 3213). No tax was to be imposed on "electrical energy used in industry." Senator Reed said that the 1932 law and its classification "means that we shall get our revenue out of electricity sold to shops and offices and places of that sort" (75 *Cong. Record*, page 11608). There is nothing which we understand as shops or stores or offices in connection with these pasteurization plants; any sales activities at the plants are minor and incidental, not preponderant.

So far as the plants in the present record are concerned, only one has at its location any accessory activity that could reasonably be classified as commercial. The buying and picking up of the raw milk, the selling and delivery of the pasteurized milk, the collections for the milk sold, the management, the commercial accounting, etc., take place off the premises of these plants.

Fifteen of the twenty-eight plants are supplied through more than one meter, but apparently for the purpose of obtaining the three-phase energy required for their large operations. The activities that could be deemed of possibly a "commercial" character are so slight in extent that they are not separately metered, as could readily be done, as authorized by the Regulations.

The Court of Appeals for the Tenth Circuit held in the *Public Service Company of Colorado* case that energy supplied to pasteurization plants was for *industrial*, not commercial consumption, and that this was unaffected by the 1941 removal of the word "processing" from the Regulations. The Commissioner did not ask for a writ of certiorari to challenge this decision. Outside the Tenth Circuit the Commissioner has lately tried to have pasteurization treated as a part of the commercial operations in dairies. The Supreme Court of Michigan held the pasteurization of milk to be a part of industrial processing (*Michigan Allied Dairy Association v. Auditor General*, 302 Mich. 643; 5 N. W. 2nd 516, 517-18). Actually, the excision of the word "processing" was evidently meant to lessen the ground for the exemption of various small-scale operations which hardly amounted to "processing" but were claimed to be such. Instances are the coloring of oranges, the filtering and bottling of olive oil, the bottling of spring water with or without additives. The pasteurization of milk as a skilled operation requiring large space and large amounts of heavy-duty machinery is plainly an "industrial" operation, to prepare and condition the raw milk and conform it to laws or ordinances governing its sale and distribution.

What is done in such a pasteurization plant, by way of preparing its product and putting it in form for sales and deliveries at other locations, is not a part of the *selling* but is a part of the "industrial" activity precedent to the "commercial" activity in preparing the product and putting it in form and content readily salable—not in selling it. Heavy-duty machinery, special skills and experience, large floor space devoted only to the pasteurization, are required in such plants. The activity is aptly characterized only as "industrial", and to characterize as merely "commercial" or "sales" this material and essential conversion of raw material into a salable product is to ignore the clear Congressional intent that industrial and related plant uses of energy should not be taxed.

Conclusion

If the Congress or the Commissioner intended to make the tax applicable as a matter of law to *all* of the energy supplied to all commercial consumers, irrespective of the use made of the energy, and not merely to such consumption as is "commercial" in nature and purpose, they could readily and clearly have said so.

If the Commissioner had believed that the statute called on him to classify consumers rather than consumption and to exempt from taxation all energy supplied for commercial consumption by a consumer predominantly "industrial" in its overall business, the Regulations would doubtless have been so written.

The decision of the Court of Appeals for the Seventh Circuit, subjecting to tax the energy supplied to the pasteurization plants of dairies, was based on an assumption that the predominant character of the overall business of the consumer, rather than the nature and purpose of the consumption at the particular locations, should be made to determine and control as a matter of law the taxability of *all* of the energy supplied to a commercial consumer. That assumption was erroneous, and the ruling for the tax should be set aside.

After full inquiry into the facts called for by the Regulations, energy sold for consumption in the pasteurization of milk is held in the Tenth Circuit to be sold for non-commercial purposes which are non-taxable under the Regulations. Pasteurization of milk was held in the Tenth Circuit to involve no "commercial" consumption of energy. In the Seventh Circuit, from an erroneous conclusion that all energy supplied to any location of a predominantly commercial business is for "commercial" consumption as a matter of law, the Court concluded that "hence" the energy

supplied to any pasteurization plant of a dairy is necessarily for "commercial" consumption.

We urge that unless and until the Congress changes the bases of the energy tax, its application and administration may best be left to proceed and be determined according to the reasonable and factual inquiries and criteria which have been set up by the Regulations from the inception of the tax.

New York, November 24, 1948.

Respectfully submitted

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APPENDIX

Internal Revenue Code:

SEC. 3411. TAX ON ELECTRICAL ENERGY FOR DOMESTIC OR COMMERCIAL CONSUMPTION.

(a) There shall be imposed upon electrical energy sold for domestic or commercial consumption and not for resale a tax equivalent to 3 per centum of the price for which so sold, to be paid by the vendor under such rules and regulations as the Commissioner, with the approval of the Secretary, shall prescribe. The sale of electrical energy to an owner or lessee of a building, who purchases such electrical energy for resale to the tenants therein, shall for the purposes of this section be considered as a sale for consumption and not for resale, but the resale to the tenant shall not be considered a sale for consumption. . . .

(26 U. S. C 1946 ed., Sec. 3411.)

Section 616 (a) had been enacted in 1932 to impose the tax upon electrical energy sold for "domestic or commercial consumption," but to be paid by the consumers. In 1933 this was amended as above, to provide for payment of the tax by the vendors of the energy. The Treasury Regulations under the 1932 law were not changed under the 1933 legislation. After the promulgation of the 1932 Regulations, the taxing provisions were on five different occasions re-enacted, extended or amended in other respects, by the Congress, without disapproval of or change in the Regulations.

Section 3411 (a) was amended by the Revenue Act of 1941, c. 412, 55 Stat. 687, Sec. 521(a) (19), to change the three per cent tax to three and one-third per cent, but the section was left otherwise the same.

Treasury Regulations 42, promulgated under the Revenue Act of 1932:

Art. 39 [as amended by T. D. 4922, 1939-2 Cum. Bull. 363]. *Effective period.*—The tax applies to electrical energy sold prior to July 1, 1941.

Art. 40 [as amended by T. D. 4393, XII-Cum-Bull. 322 (1933)]. *Scope of tax.*—The tax is imposed upon electrical energy sold for domestic or commercial consumption and not for resale, except as provided hereinafter.

The term "electrical energy sold for domestic or commercial consumption" does not include (1) electrical energy sold for industrial consumption, e. g., for use in manufacturing, processing, mining, refining, shipbuilding, building construction, irrigation, etc., or (2) that sold for other uses which likewise can not be classed as domestic or commercial, such as the electrical energy used by public utilities, waterworks, telegraph, telephone, and radio communication companies, railroads, other common carriers, educational institutions not operated for profit, churches, and charitable institutions. However, electrical energy is subject to tax if sold for use in the commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc.

Where electrical energy is sold to a single consumer for two or more purposes, through separate meters, the specific use for which the energy is sold through each meter, i. e., whether for domestic or commercial consumption, or for other use, shall determine its taxable status. Where the consumer has all the electrical energy used at a given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of this tax.

Treasury Regulations 46 (1940 ed.):

Sec. 316.190 [as added by T. D. 5099, 1941-2 Cum. Bull. 267]. *Scope of tax.* The tax imposed by section 3414 (a) of the Internal Revenue Code, as

Amended, applies, except as provided hereinafter, to all electrical energy sold for domestic or commercial consumption and not for resale.

The term "electrical energy sold for domestic or commercial consumption" does not include (1) electrical energy sold for industrial consumption, e.g., for use in manufacturing, mining, refining, ship-building, building construction, irrigation, etc., or (2) that sold for other uses which likewise can not be classed as domestic or commercial, such as the electrical energy used by electric and gas companies, waterworks, telegraph, telephone, and radio communication companies, railroads, other similar common carriers, educational institutions not operated for private profit, churches, and charitable institutions in their operations as such. However, electrical energy is subject to tax if sold for consumption in commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc., or in domestic phases, such as in dormitories or living quarters maintained by educational institutions, churches, charitable institutions, or others.

Where electrical energy is sold to a consumer for two or more purposes, through separate meters, the specific use for which the energy is sold through each meter, i.e., whether for domestic or commercial consumption, or for other use, shall determine its taxable status. Where the consumer has all the electrical energy consumed at a given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of this tax.